Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

-v.-

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the term "public body" as used in the Niagara Redevelopment Act includes a government agency which uses the hydropower itself but does not resell the hydropower to other consumers of electricity.

Whether in interpreting the provisions of the Niagara Redevelopment Act, the Federal Energy Regulatory Commission is required to harmonize that interpretation with national policies in favor of conservation and mass transportation.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The following parties may have an interest in the outcome of this proceeding:

Federal Energy Regulatory Commission
Power Authority of the State of New York
Connecticut Municipal Electric Energy Cooperative
Allegheny Electric Cooperative, Inc.
New Jersey Board of Public Utilities
Boston Edison Company
Eastern Edison Company
Fitchburg Gas and Electric Light Company
Massachusetts Electric Company
Municipal Electric Utilities Association of New York State
Vermont Department of Public Service
Public Service Electric and Gas Company
Massachusetts Municipal Wholesale Electric Company
City of Cleveland, Ohio
Bethlehem Steel Corporation
Borough of Lansdale
Arlene Violet, Attorney General of Rhode Island and Rhode Island Public Utilities Commission
Sussex Rural Electric Cooperative
Rockland Electric Company
New Jersey Preference Boroughs
General Motors Corporation
Occidental Chemical Corporation
Olin Corporation
Union Carbide Corporation

Attorneys for the above parties and the Solicitor General have been served with copies of this petition.

The Metropolitan Transportation Authority ("MTA"), petitioner herein, is a public benefit corporation created under the laws of the State of New York. N.Y. Pub. Auth. L. § 1263(1)(a). Members of the MTA's board serve *ex officio* as members of the boards of the following entities:

New York City Transit Authority
Metro North Commuter Railroad Co.
Long Island Railroad
Triborough Bridge and Tunnel Authority
Staten Island Rapid Transit Authority
Manhattan and Bronx Surface Transit Operating Authority

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

This petition for a writ of *certiorari* seeks review by this Court of an opinion and judgment of the United States Court of Appeals for the Second Circuit filed June 17, 1986. *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).[1] A petition for rehearing and suggestion for rehearing *en banc* was denied by that court on August 6, 1986 (A21-A22).

The opinion affirmed two decisions of respondent Federal Energy Regulatory Commission ("FERC"), *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985) (A49-A85) ("Opinion No. 229"), and *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985) (A23-A48) ("Opinion No. 229-A"), which had affirmed, with modifications, *Initial Decision*

1. References to "A " are to the Appendix filed herein.

of the Administrative Law Judge, 22 FERC (CCH) ¶ 63,087 (March 9, 1983) (A86-A140).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 17, 1985. The Court of Appeals denied a petition for rehearing by order filed August 6, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision whose interpretation is at issue is Section 1(b)(1) of the Niagara Redevelopment Act of 1957, 16 U.S.C. § 836(b)(1), which provides in relevant part:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance . . .

STATEMENT OF THE CASE

With the passage of the Niagara Redevelopment Act in 1957 ("NRA"), Congress authorized the Power Authority of the State of New York ("Power Authority") to finance, construct, and operate a hydroelectric power project on the Niagara River. 16 U.S.C. § 836. Because the river was considered a federal resource but the financial responsibility for the project was placed on New York state, a compromise was reached pursuant to which 50% of the power would be distributed under a federal preference to "public bodies and non-profit cooperatives" (with up to 20% of that part to be sold outside of New York State), and the other 50% would be distributed as determined by the Power Authority,

presumably to investor-owned utilities. *Id.* § 836(b). This petition arises as a result of the first judicial interpretation of the term "public bodies" as used to define preference customers in the NRA. *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).

The MTA is the New York State agency primarily responsible for substantially all of the mass transportation services in the New York Metropolitan area. It was established in 1965 to stabilize, improve and coordinate mass transportation services, and it provides overall coordination for a mass transit system which includes the New York City Transit Authority, Metro North, and the Long Island Railroad. N.Y. Pub. Auth. L. §§ 1260, 1264. These entities annually carry roughly six times the population of the United States to and from work, shopping, family, etc. No one seriously questions that the MTA has all the indicia of and is considered a "public body" as that term is generally used.

The MTA is one of the largest users of electricity in the State of New York. Its annual electric bill is in excess of $110 million. The largest part of the power, approximately 85%, is used by the New York City Transit Authority to operate the subway system, the largest mass transportation system in the world. Prior to 1976, the MTA had been a tariff customer of investor-owned utilities. The energy crisis of the early 1970's, coupled with financial problems experienced by the investor-owned utilities, led the New York State legislature in 1976 to authorize the Power Authority to purchase generating facilities from Consolidated Edison and to serve certain designated public agencies, including the MTA. N.Y. Pub. Auth. L. § 1001. In accordance with the Power Authority's tariffs, the MTA may resell the power it purchases to its subsidiaries or affiliates, but it does not resell power to other users. *See* Power Authority Service Tariff No. 9, Paragraph D., pp. 11-12; R. 622-23.[2]

2. References to "R " are to the Deferred Appendix filed in the court below.

During 1976-81 the cost of conventional energy continued to rise. Therefore, in keeping with its effort to promote mass transportation by holding down as much as possible any rate increase to the MTA, in 1981 the Power Authority allocated to the MTA up to 35 mw and 175,000 mwh per year of interruptible Niagara hydropower. R. 535-36.

At roughly the same time, in March of 1980 certain out-of-state municipal utilities challenged as insufficient the amount of hydropower allocated to the out-of-state preference customers by the Power Authority. In determining whether out-of-state preference customers should receive a portion of or the total 10% of hydropower,[3] FERC reviewed the allocations of hydropower to in-state and other out-of-state preference customers. The question of the allocation of the hydropower, in turn, raised the question of whether the MTA, an end user of electricity, was a "public body" and hence a proper recipient of preference power under the NRA.

Throughout the first twenty or more years since the enactment of the NRA, FERC had given the term "public bodies" its plain meaning interpretation. *State of Vermont Public Service Board* v. *Power Authority of the State of New York*, 55 F.P.C. 1109 (1976); *see Opinion No. 229-A*, 30 FERC at 61,194 (A28). Ignoring the plain meaning of the words Congress used and its prior holdings, and relying on a decision of the Second Circuit in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) for guidance as to Congressional intent, FERC concluded here that the MTA was not a "public body" because "only publicly-owned distributors and sellers of electricity who are capable of selling and distributing this power to the people as consumers of electricity" qualified as public bodies. *Opinion No. 229*, 30 FERC at 61,652 (A67). The MTA and certain Massachusetts utilities[4] appealed FERC's decision on this point pursuant to 12 U.S.C. § 825L.

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3. Section 836(b)(2) provides that the out-of-state entities should receive a reasonable portion up to 20% of the 50% of preference power.

4. 796 F.2d at 591 n.4. (A11)

The Second Circuit affirmed FERC's decision although it acknowledged that, read literally, the term "public body" would include government bodies like the MTA. 796 F.2d at 591 (A12).[5] Rather, the court emphasized what it believed to be the fundamental concept behind Congress' enactment of the NRA—"yardstick competition," a theory which suggests that if electric power were in "public" hands, privately owned utilities would be forced to lower their rates thereby benefitting the public at large. *Id.* at 591-92 (A12-A13). By its decision, the Second Circuit denied Niagara preference power and, by analogy, preference power under any other federal preference statute, to the MTA and to any other government agency which is not a reseller of energy.

5. The Second Circuit also affirmed FERC's holdings that (i) the term "neighboring states" should be read literally; and (ii) the out-of-state preference entities were not entitled to retroactive relief. 796 F.2d at 593-94 (A16-A20). The court declined to rule on the issue of whether the Power Authority must allocate 10% of the project power to out-of-state preference entities because the issue is "currently academic." *Id.* at 593 (A18). Those issues are not part of this petition.

REASONS FOR GRANTING THE WRIT

There are at least four reasons why the petition should be granted:

The determination affects an extremely valuable national resource and imposes millions of dollars of additional expense on the very government agencies that are least likely to be able to afford such expense.

The question of who may be considered a preference customer under a federal preference provision is a case of first impression. If the erroneous determination is permitted to stand, it will adversely impact government agencies nationwide that seek hydropower from federal projects with similar preference provisions. This Court should not wait for a conflict in the Circuits in interpreting the federal preference laws, because any delay may cause government agencies seeking preference power irreparable harm, since the hydropower allocations are not retroactive, and the government agencies might be excluded from receiving hydropower in the interim period.

The possibility of reversal on review is real. The statutory interpretation adopted below is inconsistent with plain meaning statutory interpretation rules previously announced by this Court. Further, even if it were correct not to use the plain meaning rule of statutory interpretation in this instance, the legislative history does not compel the conclusions which have been reached below.

Finally, in reviewing the NRA or other legislation allocating hydropower, FERC should be directed to interpret such acts consistently, if possible, with the policies set forth under the National Environmental Policy Act and the Urban Mass Transportation Act. FERC admittedly has considered neither the environment nor the importance of mass transportation in reaching its conclusions.

I.

THE OUTCOME OF THIS CASE AFFECTS THE ALLOCATION OF MILLIONS OF DOLLARS OF VALUABLE ASSETS AND SHOULD NOT TURN ON A STRAINED INTERPRETATION OF LEGISLATIVE HISTORY.

At least eighteen entities, plus FERC and the Power Authority, participated in the proceedings below. Some of the parties are associations with many members, bringing the total number of entities interested in obtaining the precious resource even higher.[6]

It is not surprising that so many parties have been willing to bear the expense of such a protracted litigation; the prize is worth it. If electricity is a significant element of the cost of providing service, then the ability to obtain hydropower is crucial. As FERC's Commissioner Stalon noted in his dissent, "[t]he Niagara Project's value to the preference customers is immense. [They] save several hundred million dollars annually by buying preference power instead of having to generate or purchase power at current cost." *Opinion No. 229*, 30 FERC at 61,659 (Stalon, dissenting) (A79).

The total savings from the allocation of hydropower differs from year to year depending on the actual amount of hydropower received, the base price of conventional energy, and the cost of alternate fossil fuel used to generate conventional energy. To use the example used before the Circuit Court, in 1985 the average price for conventional power purchased from the Power Authority was 6.4 cents per kilowatthour, while the price of the same unit of hydropower was less than four-tenths of a cent. In other words, the conventional power was *16* times more expensive than the hydropower. The difference between the two rates diminished in 1986 because both the Power Authority's conventional rate and the price of oil (the alternate fuel used to generate conventional energy) have dropped, but the rate difference as of September, 1986 was still very substantial—4¢ per kilowatthour.

6. The Second Circuit particularly noted the quantity of intervenors. *MTA* v. *FERC*, 796 F.2d 584, 588-89 n.3 (2d Cir. 1986) (A6).

for conventional fuel and 4.6 tenths of a cent per kilowatthour for hydropower.[7]

To put it another way, if 175,000 mwhrs of hydropower purchased from the Power Authority today cost approximately $800,000, an equivalent amount of conventional power would cost $7 million. During 1985, the Power Authority sold a total of over 14.6 billion kilowatthours from the Niagara project, roughly one half to preference customers. 1985 Power Authority of the State of New York Ann. Rep. 44. Thus, the savings to preference customers by reason of receiving hydropower (compared to the cost of Power Authority conventional power) could equal over a quarter of a billion dollars. That amount would of course increase if all the other hydropower projects with federal preference clauses were to be added.

While the fact that the stakes involved translate into hundreds of millions of dollars may not, standing alone, be a sufficient reason for *certiorari* review, the economic impact of the lower court's decision is an important factor in determining whether to grant the writ. *Cf. United States* v. *Standard Oil Co.* 332 U.S. 301, 302 n.2 (1947); *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 557 (1965). When the significant economic impact is coupled with both an error in statutory interpretation (*see* Point III, *infra*) and a failure to consider a potentially adverse impact on the environment (*see* Point IV, *infra*) the combination should be irresistible.

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7. The Second Circuit took judicial notice of the decline in the price of oil as a source of private power, *MTA* v. *FERC*, 796 F.2d at 593 (A15), but that decline does not make the difference in cost unimportant, for that difference is still enormous.

II.

THE DEFINITION OF "PUBLIC BODY" UNDER THE NRA AND OTHER FEDERAL POWER ACTS IS AN ISSUE OF FIRST IMPRESSION AND SHOULD BE DECIDED BY THE COURT NOW TO AVOID POSSIBLE IRREPARABLE INJURY TO OTHER GOVERNMENT AGENCIES WHICH MAY BE ELIGIBLE FOR HYDROPOWER ALLOCATIONS UNDER THE NRA OR OTHER FEDERAL PREFERENCE STATUTES.

The language of the NRA which is the subject of this proceeding is quoted above at page 2. In interpreting this section the Second Circuit has held, as we have said, that "public bodies," those entitled to preference power, includes only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail, not ultimate consumers or brokers. 796 F.2d at 593 (A16). The court cites no case to support its position, for none exists.[8] Important cases of first impression are particularly appropriate for review. *E.g., American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) (granting certiorari because the question was "an important one of first impression under" a Federal act); *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 733 (1961) ("novel questions"); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 (1947) ("novelty and importance of the principal question").

Moreover, the petitioner is not the only entity affected. Unless corrected, this erroneous restrictive reading of the words "public body" may also be applied in interpreting other similarly worded federal preference statutes, such as the Bonneville Project Act, 16 U.S.C. § 832d, the Flood Control Act, 16 U.S.C. § 825s, and the Fort Peck Project Act, 16 U.S.C. § 833c. If there were already a Circuit Court determination that government agencies under one of the other federal preference acts were entitled to be considered

8. The Second Circuit seemed to rely on its own prior decision in *Power Authority of the State of N.Y.* v. *FERC*, 743 F.2d 105 (2d Cir. 1984) (*"PASNY"*). However, the "public body" question had not been considered in that case. *See MTA* v. *FERC*, 796 F.2d at 589 (A8-A9).

"public bodies" and "preference customers," there would be little question that the Second Circuit's determination would be reviewed as an important "conflict" between Circuits. If the Second Circuit's reading of "public body" is allowed to stand pending such a conflict, certain otherwise eligible consumers may be deprived of a hydropower allocation. As such errors ordinarily do not result in retroactive correction, *see* 796 F.2d at 595 (A19), that would be a permanent loss to the government agency for the year in question. Therefore, here, where the stakes are high and hardship will come to those government agencies which are excluded from preference status, the Court should not wait for review until another Circuit considers the issue and rules otherwise than the Second Circuit has ruled.

III.

THE SECOND CIRCUIT'S INTERPRETATION OF THE NRA VIOLATES THE PLAIN MEANING RULE OF STATUTORY CONSTRUCTION; MOREOVER, IF ANY LEGISLATIVE HISTORY IS TO BE CONSIDERED, IT HAS BEEN MISCONSTRUED.

We appreciate that this Court cannot correct every error made below and that errors alone may not suffice for *certiorari* review. We note, however, that even a brief consideration of the merits here reveals that reversal is warranted. We will outline some of the errors in the opinion below insofar as they impact on the plain meaning rule of construction, and the legislative history relied on by the Second Circuit in respect of its crucial yardstick competition holding. There are other arguments to be made in respect of the legislative history of the NRA, the interpretation of the language of the NRA and the interpretation of federal preference statutes generally, but we will leave them to the brief on the merits.

A. The language of the NRA is clear and unambiguous and the plain meaning rule of construction should have been applied to it.

The Second Circuit stated clearly in its opinion that, literally, the term "public bodies" is not limited to "publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" 796 F.2d at 591 (A12); thus, if the plain meaning rule were adopted the court would have had to come to the conclusion diametrically opposite to the conclusion it reached concerning the MTA and other government agencies. As we have said, no one seriously questions that the MTA is a "public body" in the literal sense.

Since the court did not restrict itself to the plain meaning in interpreting the statute, it must have come to the conclusion that there exists in the legislative history some overriding principle of such clarity and vigor as to overcome the presumption in favor of the plain meaning. We will show below that no such compulsion of clear purpose exists in the legislative history. *See* pp. 14-19

infra. Before we do so, however, we note that in each of the seven cases relied on by the Second Circuit in support of its statutory interpretation, 796 F.2d at 591 (A11-A12), this Court actually *held* that unless there simply was none, the *plain meaning should prevail.* In *United States* v. *Turkette,* 452 U.S. 576 (1981), for example, this Court held that the word "enterprise" in the Racketeer Influenced and Corrupt Organizations Act included both legitimate and illegitimate enterprises. The Court noted that:

> Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate [such a restriction].

Id. at 581. Similarly here, had Congress intended to limit "public bodies" to resellers, it could easily have done so by using the term "municipal utilities" as it has done, for example, in the Department of Energy Organization Act, 42 U.S.C. § 7112(17). It used a much broader phrase here. And the authorities relied on by the court below, taken together, are a powerful argument that in this Court there is a marked reluctance to allow ambiguous legislative history to override plain meaning under the guise of congressional intent.[9]

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9. In *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council,* 470 U.S. 116, , 105 S.Ct. 1102, 1108 (1985) the word "modify" in the Clean Water Act was thought to be ambiguous, but the Court found that neither the *language* nor the legislative history demonstrated a clear intent to forbid the EPA's variance mechanism. The legislative history was not found at odds with even an ambiguous statute, and a sensible reliance on the EPA's administrative expertise was allowed.

In *Chapman* v. *Houston Welfare Rights Org.* 441 U.S. 600, 608 (1979), the issue was whether the jurisdiction granted Federal district courts over certain civil rights encompassed a claim that a state welfare regulation was invalid. In determining this narrow jurisdictional question there was no plain meaning interpretation involved. But Justice Stevens went out of his way to point out that even if Congress

> never considered the question of federal jurisdiction of claims arising under the broad scope of federal substantive authority that emerged many years later, [that did] not mean that jurisdiction cannot be found to encompass claims nonexistent in 1871 or 1874.

(footnote continued)

There is no exceptional Congressional purpose expressed in the NRA's history here and the Second Circuit has not outlined any valid reason for failing to read the term "public bodies" literally to include government agencies such as the MTA. Indeed, the Second Circuit resolved the issue of the meaning to be given to the words "neighboring states" in this proceeding by utilizing the plain meaning rule, despite the fact that Pennsylvania and Ohio are mentioned throughout the legislative history, whereas

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(footnote continued)

441 U.S. at 612. The Court went on to point out that new claims must clearly fit within the terms of the statute. *Id.*

In *Griffin* v. *Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1982), the Supreme Court held that where the Jones Act authorized seamen to recover double wages for each day that payment was delayed without cause, the District Court had no discretion to limit the period during which the penalty is assessed. The Court found the statute to be straightforward in its terms, and rejected the view that it should not be interpreted literally to produce a monetary award in excess of an equitable remedy.

In *United States* v. *Locke*, 471 U.S. 84 (1985), the Court held that the Federal Land Policy and Management Act of 1976, which required notice to be filed "*prior* to December 31," was not complied with by notice filed *on* December 31. The Court held that the literal meaning of the statute governed, and refused to hold that the Congressional purpose would also be served by a filing one day later.

In *Bread Political Action Committee* v. *FEC*, 455 U.S. 577 (1982) the Court held that trade associations and political action committees could not bring an expedited challenge to the validity of a section of the Federal Election Campaign Act under § 310(a) of the Act as only parties meeting the literal express requirement of 310(a) could invoke its procedures absent clear evidence that Congress intended to make the procedures available to categories of persons other than these listed in § 310(a). No clearly expressed contrary legislative intention was found.

In *Consumer Product Safety Commission* v. *GTE Sylvania Inc.*, U.S. 102 (1980), Justice Rehnquist, in holding that the Consumer Product Safety Act governs the disclosure of records by the Consumer Product Safety Commission pursuant to an exception in the Freedom of Information Act, stated the now oft quoted position on the plain meaning rule:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

447 U.S. at 64. The opinion then went on to hold that the legislative history failed to establish a reason for deviation.

Massachusetts, Connecticut or Rhode Island are mentioned sparsely or not at all. 796 F.2d at 594-95 (A16-A18). In other words, the court held that, despite the fact that in 1957 Congress thought hydropower could only be transmitted economically to parts of Pennsylvania and Ohio, this should not affect delivery of power to those areas which are *now* within economic transmission distance. It is unfortunate that the Second Circuit failed to see the parallel between the application of the plain meaning rule to "neighboring states" and its application to "public bodies."

Perhaps we, and other intervenors, are also at fault for having engaged in lengthy debates concerning a legislative history which should never have been considered. And perhaps we are falling into the same trap again by responding to the yardstick competition argument now. However, we feel compelled to do so, since the court's reliance on the "yardstick competition" doctrine was conclusive and is so demonstrably wrong.

B. The concept of "yardstick competition" does not require that the MTA be excluded from the preference customer class.

According to the Second Circuit, "yardstick competition" was the *sine qua non* in Congress' adoption of the Niagara Redevelopment Act; hence a preference recipient cannot be an "end-user" of electricity because that would somehow thwart the aim of yardstick competition. We disagree strongly that Congress' principal aim was to establish a "measure" to act as a spur for investor-owned utilities. But the opinion below is based almost exclusively on the assumed existence of a Congressional belief that every preference customer must be a *reseller* of electricity. However, even accepting *arguendo* that the need for yardstick competition must somehow be harmonized with the plain meaning of the NRA, we submit that such compatability can and should be achieved without excluding from the class of "public bodies" government agencies which are end users.

Further, if the Second Circuit is saying that it was Congress' intention to create a competitive marketplace so that regulated

investor-owned utilities would somehow be less greedy, and that this laudable purpose is somehow being frustrated by a literal interpretation of the NRA, then there are additional responses to be considered.

FIRST: The Second Circuit urges that governmental bodies cannot be preference customers because:

> Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

796 F.2d at 592 (A13).

This argument is based on an incorrect understanding of how the allocation process works. Just because a particular government agency is a "public body" does not mean that it would automatically be entitled to receive Niagara hydropower. The Power Authority would still be required to review the request of all potential recipients and allocate 50 percent of the power to preference customers (in and out of state) in accordance with the best use of the cheap power for the residents of the affected area as a whole. There is no requirement that every government agency, (that is, every potentially eligible preference customer) receive the requested amount of power or indeed any power. N.Y. Pub. Auth. L. § 1009. Thus, the feared anti-competitive effect—dilution of the power—just disappears.

SECOND: The Second Circuit then states: "Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers." 796 F.2d at 592 (A13). But that is also just not true even if end users were excluded as preference power recipients.

For one reason, the State Public Service Commissions which set the rates of investor-owned utilities do not permit the use of comparative rates, *i.e.*, yardstick competition, in setting rates of investor owned utilities. *See, e.g., Re Consolidated Edison*

Company of New York, 29 PUR 4th 327, 341 (N.Y.P.S.C. 1979); *Re Test Periods In Rate Cases*, 2 PUR 4th 611 (N.Y.P.S.C. 1977).

For another, despite the fact that the Second Circuit seems to believe that Congress decided to have yardstick competition in order to put economic pressure on the investor-owned utilities to encourage them to become more efficient, 796 F.2d at 592 (A13), such economic pressure is of no value today. The court may be saying that when the NRA was enacted in 1957, the investor-owned utilities had benefits which flowed from their larger size and the then-perceived benefits of economies of scale, and that Congress thought that by giving municipal utilities access to somewhat cheaper power it would provide a balance enabling the municipal utilities to compete for consumers on a more equal footing. *Id.* Maybe so, but that goal cannot be achieved today. As we have previously noted (pp. 7-8 *supra*), unlike 1957 when the rates for conventional fuel and hydropower were fairly close and some pressure might be exerted, the disparity in rates is now so great that it would be extraordinarily unreasonable for even the staunchest consumer advocate to expect that, solely by reason of the pressure from competitive municipal utilities rates, a private investor-owned utility could lower its costs to a point where the rates for power generated by conventional or nuclear plants could match or even come close to the per kilowatthour cost of hydropower. This point has been succinctly made by Alfred Kahn, respected former Chairman of the New York State Public Service Commission and Professor of Political Economy at Cornell University (*New York Times*, November 25, 1983, p. 30):

> I have long supported public power as a kind of symbolic, competitive alternative to the private companies. But George Orwell would surely appreciate the claim that these entities' preferential access to half-cent hydropower, while their private counterparts are forced to generate electricity at costs of 5 to 10 cents a kilowatt-hour, provides a yardstick against which to judge the performance of the latter. Some yardstick!

Moreover, with possible *de minimis* exceptions, there is no longer competition among utilities to obtain customers from each other. The desirability of adding new electric load, a possible goal in 1957 when the NRA was enacted, is long gone. Indeed, for the most part, the investor-owned utilities are themselves preaching "conservation" and those utilities that are currently most successful are those which do not have to build new generating plants to meet additional load. E. Erlich, *Are Utilities Obsolete? A Troubled System Faces Radical Change*, Business Week, May 21, 1984, 117, 118, 122.

THIRD: If a comparative economic measure or threat is somehow still required, then the hydropower rates charged to the MTA *by the Power Authority* can be compared with the rates charged by investor-owned utilities for comparable traction service, in exactly the same way that a *municipal utility* rate can be compared with an *investor-owned utility* rate. For example, comparing Long Island Lighting Company's traction rates to portions of the Long Island Railroad to the hydropower rate charged by the Power Authority would be as relevant as a comparison of a rate charged by a municipally owned utility to a user of traction service, and would yield the same yardstick which is sought to be preserved by the Second Circuit, meaningless though it might be. Moreover, if the investor-owned utilities rates are out of line for traction service, any traction customer can petition to be served directly by the Power Authority. No further yardstick influence could be developed if a municipal utility acted as a conduit and the hydropower were first sold to such municipal electric utility, marked up in cost, and then sold to the MTA, a method FERC seems to approve. *Opinion No. 229*, 30 FERC at 61,652 (A66).

FOURTH: Lastly, the Second Circuit reasons that, assuming the MTA is correct that "yardstick competition" makes little sense in today's energy market, it is not for the courts to second guess Congress' basic determination and "[a]ny rectification lies exclusively with Congress." 796 F.2d at 593 (A15). Going to the Congress, however, is not the sole remedy.

It has long been recognized that if the original purpose of an act can no longer be achieved, a court has the duty to interpret the act in a manner which will best serve its underlying purpose. *See*, Llewellyn, *Remarks on The Theory Of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 400 (1950). It is for this reason that a court should

> ask itself not only what the legislation means abstractly, or even on the basis of legislative history, *but also what it ought to mean in terms of the needs and goals of our present day society*. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature. [emphasis added]

Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950); *see also, Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 813 (2d Cir. 1966), where the court, in interpreting a Warsaw Convention provision regarding venue, noted that "[c]ertainly the framers were not so remarkably prescient that they foresaw future interline arrangements like those implemented by the International Air Transport Association"; and *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933) where Justice Cardozo suggested that in making legislative interpretations courts and agencies must analyze "[w]hich choice is it the more likely Congress would have made?"

If the question is "what choice would Congress have made if yardstick competition had not been a viable concept at the time of enactment," then we should consider the basic philosophy underlying public power legislation. When enacted, the NRA's marketing policy was, as we have said, a compromise between the public power advocates who wished the power to be marketed under traditional federal preference rules, and private power advocates who wished it to benefit the investor-owned utilities. *See* 103 Cong. Rec. 14439 (August 12, 1957) (Remarks of

Senator Ives); 103 Cong. Rec. 14451 (August 12, 1957) (Remarks of Senator Kerr). If the universe were divided between private investor-owned utilities on one side and "public bodies" on the other, it seems clear that the MTA and other agencies similarly situated would end up on the public side. There is no philosophical reason to believe that the federal preference should exclude a mass transportation government agency and extend only to municipal utilities which resell power to residential, commercial, and industrial retail customers.

IV.

FERC IS REQUIRED TO CONSIDER FEDERAL POLICIES IN FAVOR OF MASS TRANSPORTATION AND ENERGY CONSERVATION IN REVIEWING THE POWER AUTHORITY'S ALLOCATIONS UNDER THE NRA.

The only environmental testimony in the record is that the Power Authority granted the MTA Niagara preference power to keep the total energy costs to the MTA as low as possible and thereby to have a beneficial effect on public transportation and energy consumption, and to reduce pollution. R. 535-36. The minutes of the Power Authority's meeting approving the allocation of the hydropower to the MTA provided that one of the specific purposes is "to encourage mass transit use as a means of reducing dependence on imported oil in the metropolitan New York area." R. 437. Contrariwise, an increase in the MTA's overall power costs for whatever reason, including a diminution of the amount of available hydropower, would have a substantial negative effect on the MTA's ability to maintain the same level of service without increasing fares.[10] To the extent that current mass transportation users would then turn to driving their own cars both pollution and energy consumption would be increased.

It has been held that the Federal Power Act, which created the Federal Power Commission (now FERC) "is not immune from the effects of other subsequent acts of Congress of general application." *Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980).

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (*"NEPA"*) requires that FERC

> to the fullest extent possible. . . . [ensure that] the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA].

10. At the present time, the Power Authority has assigned the MTA 175,000 mwh of interruptible power from the non-preference half of the available hydropower, but the MTA would petition the Power Authority for additional hydropower if it were eligible to be considered a preference customer.

42 U.S.C. § 4332(2).

In enacting the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1601 *et seq.* Congress specifically provided:

> the termination of [mass transportation] service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of substantial number of lower income persons. . . .

49 U.S.C. § 1601(b)(5).

Similarly, in the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 2601 *et seq.*, Congress expressed its concern that the United States consumes over twice as much energy per capita as do European countries, mostly because of the use of cars and trucks.[11] Accordingly, one important element of the national program for energy conservation has been Federal assistance for mass transit.[12]

The Second Circuit responded to the MTA's arguments that FERC ought to consider environmental and mass transportation issues when considering its interpretations of the NRA by saying "Congress' intent controls." 796 F.2d at 594 n.8 (A16). But here where the Congressional intent is inconclusive and there are significant anti-pollution and pro-mass transit policies which also reflect Congressional intent, the NRA should be read in a way which is consistent with all three policies.

FERC argued that there was no environmental consideration involved, citing *City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978), and the Second Circuit adopted FERC's wholly illogical position, as follows:

> Moreover, even if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment.

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11. S. Rep. No. 141, 95th Cong. 2d Sess. 7 (1977) *reprinted in* 1978 U.S. Code and Cong. Ad. News 7659, 7676.

12. S. Rep. No. 141, 95th Cong. 2d Sess. 9-10, *reprinted in* 1978 U.S. Code & Cong. Ad. News 7659, 7678-79.

796 F.2d at 593-94 n.8 (A16).

But the situation in the instant case is quite different from the position of the City of Santa Clara. The Ninth Circuit rejected Santa Clara's claim that it should receive low cost power for environmental reasons on the grounds that it did not matter whether Santa Clara or some other preference entity received the power since the power was finite and ultimately additional generating plants would have to be constructed with similar adverse environmental consequences. The court there said:

> [W]e think it highly improbable that one allocation scheme will have a more deleterious impact than any other when the total geographic area served by the CVP is considered. As the court stated (citing authorities) an agency must consider "in deciding whether a major federal action will significantly affect the quality of human environment . . . the absolute quantitative adverse environmental effects of the action itself." No such absolute effects are threatened by the Secretary's decision to allocate CVP power in one way rather than another.

Santa Clara, 572 F.2d at 680 (citations omitted). In the instant case, however, the absolute quantitative adverse impact is quite different depending on whether the MTA or some other entity such as a municipal utility receives the hydropower. The effect on the environment is not the construction of additional generating facilities—because the fossil fuel generated power is available in this geographic area if hydropower is not. Rather, depriving the MTA of the cheap power raises the MTA's expense, diminishes the number of passengers it carries, and immediately results in increased automobile use. Hence, there is an *immediate* cause and effect impact on the environment in terms of increased energy consumption and pollution which would not result if the same amount of hydropower were withdrawn from other consumers.

Moreover, even the Ninth Circuit has modified *Santa Clara* on similar grounds. In *Forelaws on Board* v. *Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied*, U.S. , 106 S. Ct. 3293 (1986), there was a challenge to the Bonneville Power Administration's ("BPA") offer of long term contracts without compliance or

consideration of NEPA. BPA also relied on the *Santa Clara* decision and argued that, as a matter of law, power allocations do not affect the environment. 743 F.2d at 681-82. The Ninth Circuit, however, refused to accept that argument and distinguished *Santa Clara* on the grounds that (i) the long term contract allocations would ultimately "help determine the magnitude of BPA power obligations in the future and thus will have an impact upon long-range region energy plans"; and (ii) the BPA's action "significantly affect[ed] the environment because [it] involve[d] important policy choices affecting energy conservation." 743 F.2d at 682.

FERC, and in turn the courts, have an obligation to harmonize *all* the competing environmental concerns and public policy considerations in favor of mass transportation. The avoidance of a strained construction of "public bodies" pursuant to the NRA would go a long way towards avoiding conflicting federal principles.

CONCLUSION

The Second Circuit's interpretation of the term "public body" in the NRA affects the allocation of vast amounts of a very valuable resource, is a case of first impression, affects governmen agencies under other federal preference power acts, violates the plain meaning canon of statutory construction, completely misinterprets the legislative history, and fails to consider the impact o the statutory construction on mass transportation and the environment. For these reasons, the MTA respectfully requests tha this Court grant the petition for a writ of *certiorari*.

Dated: November 3, 1986

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 1150-1155, Dockets 85-4115, 85,4149, 85-4151, 85-4153, 85-4159, 85-4165

METROPOLITAN TRANSPORTATION AUTHORITY, Power Authority of the State of New York, Connecticut Municipal Electric Energy Cooperative, Allegheny Electric Cooperative, Inc., New Jersey Board of Public Utilities, Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, and Massachusetts Electric Company,

Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

Municipal Electric Utilities Association of New York State, Vermont Department of Public Service, Allegheny Electric Cooperative Inc., Public Service Electric and Gas Company, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, City of Cleveland, Ohio, New Jersey Board of Public Utilities, Bethlehem Steel Corporation, Borough of Landsdale, Arlene Violet, Attorney General of Rhode Island and Rhode Island Public Utilities Commission, Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company, Rockland Electric Co., and Sussex Rural Electric Cooperative, and New Jersey Preference Boroughs,

Intervenors.

Argued April 23, 1986.

Decided June 17, 1986.

Gerald Tarrant, Vermont Dept. of Public Service, Montpelier, Vt. (Patterson, Belknap, Webb & Tyler, New York City, McCarthy, Sweeney & Harkaway, P.C., Washington, D.C., of counsel), for intervenor Vermont Dept. of Public Service.

William E. Mowatt, Gen. Counsel Allegheny Electric Cooperative, Inc., Harrisburg, Pa. (Robert Weinberg, Duncan, Weinberg & Miller, P.C., Washington, D.C., William C. Wise, Chevy Chase, Md., of counsel), for intervenor Allegheny Elec. Cooperative, Inc.

James R. Lacey, Gen. Sol., Public Service Electric and Gas Company, Newark, N.J., for intervenor Public Service Elec. and Gas Co.

Marilyn G. Zack, Director of Law, Cleveland, Ohio (June W. Wiener, Chief Asst. Director of Law, Wiliam M. Ondrey Gruber, Asst. Director of Law, Cleveland, Ohio, Reuben Goldberg, Goldberg, Fieldman and Letham, P.C., Washington, D.C., of counsel) for intervenor City of Cleveland, Ohio.

W. Cary Edwards, Atty. Gen., State of N.J., Newark N.J. (Elise Goldblat, Deputy Atty. Gen., Newark N.J., of counsel), for intervenor and petitioner New Jersey Bd. of Public Utilities.

Joshua Z. Rokach, Atty., F.E.R.C., Washington, D.C. (William H. Satterfield, Gen. Counsel, Jerome M. Feit, Sol., F.E.R.C., Washington, D.C., of counsel), for respondent Federal Energy Regulatory Com'n.

Duncan, Weinberg & Miller, P.C. Washington, D.C. (Wallace L. Duncan, J. Cathy Lichtenberg, Jeffrey C. Genzer, Washington, D.C., of counsel), for intervenor Municipal Electric Utilities Ass'n of New York State.

Ely, Ritts, Brickfield & Betts, Washington, D.C. (Philip L. Chabot, Jr., Kirk Howard Betts, Washington, D.C., of counsel), for intervenor Sussex Rural Elec. Cooperative.

Spiegel & McDiarmid, Washington D.C. (David R. Straus, Scott H. Struass, Washington, D.C., of counsel), for intervenors Massachusetts Mun. Wholesale Elec. Co. and Connecticut Mun. Elec. Energy Cooperative.

Renee Schwartz, New York City (Ezio Scaldaferri, Botein Hays & Sklar, New York City, of counsel), for petitioner Metropolitan Transp. Authority.

David R. Straus, Washington, D.C. (Scott H. Strauss, Spiegel & McDiarmid, Washington, D.C., of counsel), for petitioner Connecticut Mun. Elec. Energy Cooperative.

Robert Weinberg, Washington, D.C. (Duncan, Weinberg & Miller, P.C., Washington, D.C., William C. Wise, Chevy Chase, Md., William E. Mowatt, Gen. Counsel, Allegheny Electric Cooperative, Inc., Harrisburg, Pa., of counsel), for petitioner Allegheny Elec. Cooperative, Inc.

Carmen L. Gentile, Washington, D.C. (Bruder & Gentile, Washington, D.C., of counsel), for petitioners Boston Edison Co., Eastern Edison Co., Fitchburg Gas and Electric Light Co., and Massachusetts Elec. Co.

Charles M. Pratt, Senior Vice President and Gen. Counsel, Power Authority of State of N.Y., New York City (Arthur T. Cambouris, Wendy M. Lane, Power Authority of the State of New York, New York City, of counsel), for petitioner Power Authority of State of N.Y.

Law Offices of Algrid F. White, Jr., Albany, N.Y. (Barbara S. Brenner, Albany, N.Y., of counsel), for intervenor Bethlehem Steel Corp.

Wheatly & Wollesen, Washington, D.C. (Charles F. Wheatly, Washington, D.C., of counsel), for intervenor Borough of Lansdale, Pa.

Sheldon Whitehouse, Sp. Asst. Atty. Gen., Providence, R.I., for intervenors Arlene Violet, Attorney General of Rhode Island, and Rhode Island Public Utilities Comn.

Bruder & Gentile, Washington, D.C. (Carmen L. Gentile, Washington, D.C., of counsel), for intervenors Boston Edison Co., Eastern Edison Co., Fitchburg Gas and Electric Light Co. and Massachusetts Electric Co.

LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C., (M. Reamy Ancarrow, Washington, D.C., of counsel), for intervenor Rockland Elec. Co.

Before LUMBARD, MANSFIELD and MESKILL, Circuit Judges.

MANSFIELD, Circuit Judge:

Nine parties to this proceeding have filed petitions for review of two decisions of the Federal Energy Regulatory Commission ("FERC") concerning the allocation of hydropower produced by the Niagara Power Project ("the Project").[1] The Niagara Redevelopment Act, 16 U.S.C. § 836, *et. seq.*, requires the Power Authority of the State of New York ("PASNY"), the licensee authorized to operate the Project, to allocate "a reasonable portion" of the Project power, which may not be more than 10%, to "public bodies and nonprofit cooperatives . . . within reasonable economic transmission distance in neighboring states." The petitions challenge FERC's holding that (i) "public bodies" are "publicly-owned sellers and distributors of electricity at retail", (ii) neighboring states include, at least, those states which border New York, (iii) PASNY is required to sell a "reasonable portion" of the Project's power, up to 10%, to public bodies and non-profit cooperatives outside of New York, and that 10% of the Project's power was such a reasonable portion under current circumstances, and (iv) public bodies and non-profit cooperatives outside of New York are not entitled to an extra allotment of power as retroactive relief for PASNY's past failure to sell them 10% of the Project power. We affirm.

BACKGROUND

FERC has licensed PASNY to administer the Niagara Power Project, which generates hydro-electric power from the Niagara River near Niagara Falls. The Niagara Redevelopment Act (the "NRA"), under which the license was issued, provides in pertinent part:

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1. The orders are: *Opinion No 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985); *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985).

> "(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance . . .
>
> "(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) . . . available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. 16 U.S.C. § 836(b)."

The "50 per centum" of project power set aside for "public bodies and nonprofit cooperatives" is called "preference power" and the entities eligible to receive it are "preference customers."

In March 1980 the Connecticut Municipal Electric Energy Cooperative ("CMEEC") and the Massachusetts Municipal Wholesale Electric Company ("MMWEC") filed complaints against PASNY and motions for partial summary judgment with FERC. Both MMWEC and CMEEC are political subdivisions of their respective states. Their states have designated them bargaining agents "for the procurement" of Niagara power for preference customers in the state. 16 U.S.C. § 836(b)(2). The complaints accused PASNY of refusing, in violation of 16 U.S.C. § 836(b)(2), to sell preference power to the "neighboring states" of Connecticut and Massachusetts or to allocate a full 10% of the Project power to preference customers outside of New York.

In its answer PASNY conceded that Connecticut and Massachusetts were "neighboring states" and that it was allocating less than 10% of the Project's power to preference customers outside of New York. It argued, however, that its decision not to sell preference power to CMEEC and MMWEC was justified

because it was already selling a "reasonable" portion of such power to preference customers outside of New York, even though the total amount sold was less than 10%. PASNY also noted that it was selling to the New York City Transit Authority ("NYCTA") and to the Metropolitan Transit Authority ("MTA") a portion of the preference power which it would otherwise have sold out-of-state. MTA is the New York State agency responsible for most of the mass transportation services available in the New York City metropolitan area.

On September 10, 1980, FERC consolidated MMWEC and CMEEC's complaints. It also granted several petitions to intervene, including those of Allegheny Electric Cooperative (Allegheny) and the Vermont Department of Public Service ("VDPS").[2] Allegheny is an organization of fourteen New Jersey and Pennsylvania rural electrical cooperatives. VDPS is a Vermont state agency responsible for purchasing power from PASNY and other power authorities. Vermont first requested Niagara power in 1960 and VDPS has been buying it since 1962. Unlike CMEEC and MMWEC, the bargaining agencies for Connecticut and Massachusetts, VDPS purchased preference power not only for preference customers but for Vermont consumers served by privately-owned utilities. Since VDPS did not own a distribution network, it did not distribute the power itself but resold the power to private utilities which in turn sold it to retail customers. It, however, "sought to assure that rural and domestic consumers within the State of Vermont [were] benefited by the low cost power made available by requiring the Vermont utilities, whether investor owned, municipals, or cooperatives, to effect rate reductions." *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109, 1122 (1976).[3]

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2. Prior to 1980 VDPS was called the Vermont Public Service Board (VPSB).

3. During the course of the consolidated proceeding the presiding administrative law judge allowed several other parties to intervene. These included the Metropolitan Transit Authority (MTA), Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company and Massachusetts Electric Company, who are

FERC ruled on CMEEC and MMWEC's complaints and motions for summary judgment on February 13, 1981. *Order Granting in Part and Denying in Part Motions for Summary Disposition and Providing for Hearing,* 14 FERC (CCH) ¶ 61,127 (Feb. 13, 1981). It held (1) that Connecticut and Massachusetts were "neighboring states" within the meaning of the NRA, (2) that PASNY could not make "substantially disproportionate allocations [of preference power] favor[ing] one neighboring state within economic transmission distance while excluding another state, [when] similar benefits are to be realized" and (3) that "[a]lthough PASNY is not required to allocate a full 10 percent of Niagara Power to out-of-state entities it is required to allocate a reasonable amount up to 10 percent." *Id.* at p. 61,232. FERC then ordered an evidentiary hearing on the question of whether PASNY was allocating a reasonable amount of preference power to out-of-state entities and whether, given the relative benefit the preference power would confer upon different neighboring states, CMEEC and MMWEC were entitled to any, and if so, how much, power. In response to Allegheny and to the application of CMEEC and MMWEC for a rehearing, FERC reaffirmed its holding that "out-of-state [preference] entities are not always entitled, as a matter of law, to allocations aggregating a full ten percent of project power." *Order on Rehearing and Denying Motion,* 18 FERC (CCH) ¶ 61,217 at p. 61,440

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appellants before this court. After FERC issued its decision, *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision in Niagara Preference Power for States Neighboring New York,* 30 FERC (CCH) ¶ 61,323 (March 27, 1985), it allowed yet another appellant in this case, the New Jersey Board of Public Utilities, to intervene and request a rehearing. *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time,* 32 FERC (CCH) ¶ 61,194 (July 30, 1985). By the time the case reached this court, FERC had allowed 16 parties to intervene. Eight of them, along with CMEEC, petitioned for review of FERC's order. In an orgy of redundancy, CMEEC and the 16 intervenors filed a plethora of briefs in this appeal. This waste and excessive burden on the court indicates the need for more restrictive orders by Staff Counsel under our Civil Appeals Management Plan as a means of avoiding unnecessary duplication.

(March 4, 1982). In the process, it rejected Allegheny's argument that the NRA's legislative history demonstrated that Congress intended "neighboring states" to only mean Ohio and Pennsylvania.

Administrative Law Judge George Lewnes held extensive hearings on the case throughout April and May of 1982. In March, 1983 he issued his decision. *Initial Decision of the Administrative Law Judge,* 22 FERC (CCH) ¶ 63,087 (March 9, 1983). He concluded that the "reasonable amount up to 10%" requirement obligated PASNY to allocate the full 10% of all types of project power to out-of-state preference entities. He also adhered to FERC's earlier decision in *State of Vermont Public Service Board, supra,* rejecting the argument advanced by one of the intervenors in the suit, Municipal Electric Utilities Association of New York State ("MEUA") (the representatives of the New York preference customers), that VDPS, a state agency which procures power for private utilities and municipal systems, did not qualify as a preference customer. On the contrary, he held that VDPS was entitled to preference status even though it did not distribute power and had no facilities of its own. Somewhat inconsistently, however, he adopted by reference, *id.* at p. 65,289, the view that, by "public bodies" the NRA meant "governmental entities that resell and distribute the preference power to the people as consumers of such power." *Opinion No. 151; Declaratory Opinion and Order Affirming with Modifications Initial Decision in Niagara Preference,* 21 FERC (CCH) ¶ 61,021 at p. 61,129 (Oct. 13, 1982) (FERC decision considering challenges to PASNY's allocation of power to preference customers in New York State). Accordingly he held that the MTA, which was not a power distributor but a user, was not entitled to preference power. FERC had previously so held, for the same reasons, in *Opinion No. 151, supra,* but, when the MTA argued that it had not been given adequate notice prior to *Opinion No. 151* that its status as a preference customer would be adjudicated, FERC voided its decision and ordered the question of

MTA's status to be decided in the MMWEC and CMEEC dockets. *Opinion No. 151-A; Order on Rehearing Modifying Declaratory Opinion and Order on Niagara Preference With Respect to the Remedy*, 23 FERC (CCH) ¶ 61,031 (April 6, 1983)).

Upon review, FERC affirmed Judge Lewnes in most regards. *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985). It reiterated its earlier holdings that Massachusetts and Connecticut were "neighboring states" and that PASNY was not required, as a matter of law, to allocate 10% of the preference power to out-of-state entities. *Id.* at p. 61,645-47. FERC agreed with Judge Lewnes, however, that PASNY would not be acting reasonably under the current circumstances if it allocated less than 10% of the power to those out-of-state entities. FERC rested its finding on the fact that "New York State preference customers would not need 40 per cent of the project power until the winter of 1986/87 . . . [and that] PASNY will be acting arbitrarily and unreasonably if it sells preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA. [Otherwise], the congressional intent to allocate 50 percent of the project power to preference customers [would be] defeated by PASNY's allocation decisions." *ID.* at p. 61,646. It accordingly ordered that, as of July 1, 1985 (the expiration date of many of PASNY's contracts to sell power generated by the Niagara and St. Lawrence Power Projects), PASNY must sell 10% of the Niagara power to preference customers outside of New York.

Since the New York preference customers had never used 40% of the preference power, it was implicit in FERC's holding that PASNY had not been selling enough preference power out of state for some time. FERC, however, refused the out-of-state preference customers' demand that it order PASNY to sell to CMEEC and MMWEC an extra allotment of power in the future to make up for the past shortfall. It reasoned that "since the

supply of preference power and/or energy is finite, any recompense would be at the expense of other customers. [I]t would be unduly punitive to reduce the allocations of customers which were not at fault." *Opinion 229, supra,* 30 FERC at p. 61,656.

FERC agreed with the ALJ that the MTA was not a "public body" entitled to preference power. Overruling its earlier decision in *State of Vermont Public Service Board, supra,* it also held that neither was VDPS. Relying in part on our decision in *Power Authority of the State of N.Y. v. F.E.R.C.,* 743 F.2d 93 (2d Cir. 1984) (reviewing *Opinion No. 151, supra,* and *Opinion No. 151-A, supra*) FERC decided that Congress intended the term "public bodies" to mean "public distribution systems" or "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Opinion No. 229, supra,* 30 FERC at p. 61,651. It found that Congress included the preference provisions in the NRA to foster "yardstick competition." The principle of yardstick competition is that "if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all, including rural and domestic consumers." *Power Authority of the State of N.Y., supra,* 743 F.2d at 105. FERC concluded that neither MTA, a government entity which used all the preference power it received, nor VDPS, an entity which resold the power to private utilities, could compete with the private utilities or provide "yardstick competition." Accordingly, MTA and VDPS were not "preference customers" within the meaning of the NRA.

Virtually every party to *Opinion 229* and several movants for intervention asked FERC for a rehearing. FERC complied and, in *Opinion 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time,* 32 FERC (CCH) ¶61,194 (July 30, 1985), affirmed its earlier opinion.

Shortly before *Opinion 229-A* was rendered, the Vermont legislature authorized VDPS "to distribute and sell at retail electrical

energy purchased from the Niagara and St. Lawrence power projects directly to all rural and domestic consumers of electricity in Vermont by entering into agreements with Vermont electrical utilities that include, without limitation, the leasing of facilities and the providing of services to the department to distribute such electrical energy." 30 V.S.A. § 212a. The law was intended to bring the Board within FERC's definition of "public body." In *Opinion 229-A* FERC expressly declined to rule on whether the legislature had succeeded, *Opinion 229-A, supra,* 22 FERC at n. 12, and the question is not before us on this appeal.

DISCUSSION

Appellants raise four challenges to *Opinion 229* and *Opinion 229-A.* MTA and a collection of Massachusetts utilities[4] challenge FERC's conclusion that MTA and VDPS are not "public bodies" entitled to preference power. Allegheny challenges FERC's holding that the term "neighboring states" includes states other than Pennsylvania and Ohio. It also seeks to challenge FERC's view that PASNY is not required, as a matter of law, to allocate 10% of the Project power to preference customers outside of New York State. Finally, CMEEC challenges FERC's conclusion that CMEEC and MMWEC are not entitled to retroactive relief for PASNY's past failure to sell a "reasonable" amount of preference power to out-of-state entities.

The Definition of Public Bodies

As a general rule, a statute should be read according to its literal terms, *United States v. Locke,* —U.S.—, 105 S.Ct., 1785, 1792, 85 L.Ed.2d 64 (1985); *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980), unless this produces an

4. Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company and Massachusetts Electric Company. Since Massachusetts has planned to form an agency similar to VDPS (prior to the Vermont legislature's recent change in that organization) these Massachusetts companies would stand to benefit if the former VDPS were held to be a "public body".

interpretation which makes little sense, *Chemical Mfrs. Ass'n v. Natural Res. Defense Coun.*, —U.S.—, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985); *United States v. Turkette*, 452 U.S. 576, 587, 101 S.Ct. 2524, 2530, 69 L.Ed.2d 246 (1981), does violence to the purposes Congress sought to serve by the statute, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979), or is otherwise "demonstrably at odds with the intentions of [the statute's] drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). *See also Locke, supra*, 105 S.Ct. at 1792; *Bread Political Action Committee v. F.E.R.C.*, 455 U.S. 577, 580, 102 S.Ct. 1235, 1237, 71 L.Ed.2d 432 (1982); *Consumer Product Safety Commission, supra*, 447 U.S. at 108, 100 S.Ct. at 2056. Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that that is what Congress intended the term to mean.

As we noted in *Power Authority of State of N.Y., supra*, 743 F.2d at 105, Congress' intent in adopting the NRA's preference provisions was to foster "yardstick competition." S.Rep. No. 539, 85th Cong., 1st Sess. 7 (1957) ("S.Rep."); *Development of Power at Niagara Falls, N.Y.: Hearings Before a Subcommittee of the Committee on Public Works on S. 512 and S. 1037*, 85th Cong., 1st Sess. 12-13 (1957) ("S. Hearings") (Sen. Clark); 103 Cong.Rec. 14438 (1957) (Sen. Chavez).[5] Congress believed that it was necessary to create "publicly owned power" because "electric-power distribution tends to be a monopoly, and . . . the only way to gain for the consumer the normal benefits that . . . flow from competition is to develop public-power 'yardsticks' ".

5. Witnesses who testified before Congress emphasized that the preference provision was designed to foster yardstick competition. *See* S. Hearings, *supra*, at 269 (Statement of Edward Lindey, President, Central Electric Cooperative, Pa.); *id.* at 282 (Statement of Clyde Ellis, General Manager, National Rural Electric Cooperative Association); *id.* at 305 (Statement of Alex Radin, General Manager, American Public Power Association); *id.* at 314 (Statement of Leland Olds, Director, Energy Research Associates).

Minority Views of Senator Richard L. Neuberger, S.Rep., *supra*, at 10.[6] *See also* S. Hearings, *supra*, at 12-13 (Sen. Clark). The municipal utilities, Congress, hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rates of return. *Power Authority of the State of New York, supra*, 743 F.2d at 105.

Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers. If the "public body" used the preference power itself, the privately-owned utilities would not face any pressure to reduce the prices they charge other customers. Similarly, if the "public body" simply resold the preference power to the privately-owned utilities (as did VDPS) the preference power would not have fostered competition. As Senator Neuberger observed, "public generation is not enough. The power must be made available to public and cooperative distributing systems, so that the public operation will extend from the turbine to the reading lamp in the living room. Only in that way is competition established." S.Rep., *supra*, at 10. *See also* S. Hearings, *supra*, at 12-13 (Sen. Clark). Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

Accordingly, at least one senator stated that the preference clause gave priority to "municipalities which purchase or generate and sell their own power", 103 Cong.Rec. 14440 (Sen. Clark), as did congressmen and experts who treated "municipal utility", "municipal plant", "municipal electric system", and

6. Senator Neuberger did not differ from the majority in his view of why a preference provision was necessary. He only disagreed with the Senate's conclusion that the provision should only apply to 50% of the Project power. *Power Authority of the State of New York, supra*, 743 F.2d at 101; S.Rep., *supra*, at 10.

"municipal system" as synonymous with "public body" in their testimony. S.Rep., *supra*, at 10 (Sen. Neuberger); S. Hearings, *supra*, at 81 (Sen. Clark); *id.* at 23 (Sen. Neuberger); *id.* at 254 (Blaine Stockton, President, New York State Association of Rural Electric Cooperatives); *id.* at 282 (Clyde Ellis, General Manager, National Rural Electric Cooperative Associati n); 103 Cong.Rec. 13205 (Rep. Chudoff); *id.* at 13209 (Rep. Ryrd); 103 Cong.Rec. 14439 (Sen. Ives); *id.* 14444 (Sen. Javits). In fact, it was implicit throughout the debates that "public bodies" were publicly-owned entities capable of distributing the preference power they received. The primary argument made by critics of the preference provision was that the provision would foster inefficiency by encouraging municipalities to qualify as buyers of preference power by building transmission lines and electric plants duplicating those of the privately-owned utilities. S. Hearings, *supra*, at 20 (Sen. Ives); *id.* at 32 (Rep. Miller); *id.* at 156 (Sen. Javits); *id.* at 237 (Andrew McMahon of Utility Workers Union of America, AFL-CIO). Obviously, that argument would have had little force if government bodies could receive the power whether or not they had the means to distribute it.[7]

7. We also note that Congress considered the NRA's preference provision to be a standard "federal-type" preference. *Power Authority of the State of New York, supra*, 743 F.2d at 105. The federal power acts adopted prior to the NRA seem to have equated "public bodies" with publicly-owned utilities. Several contained provisions stating that public bodies should not be denied an allotment of preference power "on the ground that any proposed bond or other security issue of any such public body or cooperative, the sale of which is necessary to enable such prospective purchaser to *enter into the public business of selling and distributing the electric energy proposed to be purchased*, has not been authorized or marketed, until after a reasonable time, ... has been afforded such public body or cooperative to have such bond or other security issue authorized or marketed." The Bonneville Project 16 U.S.C. § 832c. (Emphasis supplied). *See also* The Boulder Canyon Project, 43 U.S.C. § 617d(c); Tennessee Valley Authority, 16 U.S.C. § 831k.

These provisions assume that a public body cannot receive preference power unless it has entered "into the business of selling and distributing ... electric energy". Otherwise, if these bodies were entitled to purchase federal power without entering into the business of distributing it to others, such provisions would have been superfluous.

Similarly, provisions in federal power acts permitting a public body to resell power to nonpreference customers, subject to a priority for public

The MTA argues that the yardstick competition theory makes little sense in today's energy market because the disparity between the low cost of hydropower and the higher cost of privately-produced power makes competition between the two close to impossible. In view of Congress' crystal clear intent to adopt the NRA's preference provision in order to create yardstick competition, that argument must be rejected. Assuming *arguendo* the improbability of such competition (although we take judicial notice of the recent sharp decline in the price of oil as a source of private power) "[i]t is not for FERC or ourselves to second-guess [Congress'] basic determination." *Power Authority of the State of New York, supra,* 743 F.2d at 105. Any rectification lies exclusively with Congress.

MTA also argues that, since one congressman noted that the bill made "provision for dealing with industrial and defense emergencies", 103 Cong. Rec. 13203 (Rep. Dooley) and a second referred to "defense projects or Government installations" as possible recipients of the preference power, *id.* at 14448 (Sen. Kerr), Congress could not have intended that preference power be made available only to public bodies capable of distributing the power to customers. The MTA reads too much into the congressmen's remarks. An earlier version of the NRA, S.512, 85th Cong., 1st Sess. (1957) required that PASNY should give "preference for the purchase of [Niagara Project] power to . . . the defense agencies of the United States." Representative Dooley and Senator Kerr apparently believed that the provision finally adopted retained that preference. S. 512, however, never offered a preference to non-defense related government bodies which did not distribute the power to consumers. Accordingly, even if the NRA's preference provision should be read in light of S. 512, the congressmen's remarks do not suggest that non-defense bodies such as the MTA and VDPS merit preference power.

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bodies, *see, e.g.,* the Bonneville Act, 16 U.S.C. § 832d, are consistent with the requirement that the public bodies be distributors. Indeed, we held in *PASNY Public Authority of the State of New York, supra,* 743 F.2d at 104-05, that municipal utilities purchasing hydropower from PASNY may resell it to industrial users.

We therefore affirm FERC's conclusion that the term "public bodies" in 16 U.S.C. § 836(b)(1) means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." MTA does not contend that it satisfies that definition and VDPS does not argue that it satisfied the definition prior to the passage of 30 Vt. Stat.Ann. § 212a, *see supra* at 13. Neither MTA nor VDPS were purchasing hydropower from PASNY for resale to customers at retail. MTA was not reselling the power at all. By reselling power to private utilities VDPS was lessening any potential competition on their part in the distribution of the power which might occur if the preference power were distributed through municipal utilities. Accordingly, we affirm FERC's conclusion that VDPS, as constituted prior to 1986, and MTA are not "public bodies" entitled to purchase preference power from PASNY.[8]

The Definition of "Neighboring States"

Title 16 U.S.C. § 836(b)(2) requires PASNY to provide preference power "for use within reasonable economic transmission distance in neighboring states." Unlike Congress' use of the term "public bodies", there is no evidence that it intended "neighboring states" as used in this phrase to have any meaning other than its literal one: states found to be within reasonable geographic proximity of New York, after taking into account all relevant factors

8. The other arguments advanced in support of the claim that the term "public body" should be construed to include a consumer such as MTA merit little discussion. The NRA's provision of a rate-setting mechanism for resale of project power by municipal utilities to non-preference customers, 16 U.S.C. § 836(b)(5), is irrelevant to the definition of a public body. The NRA does not require FERC to ignore yardstick competition in favor of subsidizing mass transit, as MTA argues, or to classify the MTA as a "public body" under the Act on the ground that this will promote environmental considerations by enabling the MTA to avoid using more expensive fuel. Congress' intent controls. *See City of Santa Clara v. Andrus*, 572 F.2d 660, 679-80 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978). Moreover, even if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment.

and whether they are within reasonable economic transmission distance. Massachusetts and Connecticut border New York and fall within that definition. Allegheny argues, however, that the NRA's legislative history reveals that Congress meant "neighboring states" to only refer to Pennsylvania and Ohio. We disagree.

In 1957 there was some doubt about what the "economic transmission distance" was for Niagara hydropower, but congressmen and witnesses agreed that it was between 150 and 400 miles.[9] Accordingly, Congress acknowledged when adopting the NRA that for a time only customers in western Pennsylvania and northeastern Ohio would receive power under § 836(b)(2). *See, e.g.*, S.Rep., *supra*, at 5, 6; H.Rep. No. 862, 85th Cong., 1st Sess., *reprinted in* 1957 U.S.Code Cong. & Ad. News 1587, 1592, 1593.[10]

No congressman suggested, however, that § 836 meant that Niagara power should always be available only to those limited areas which happened to be within economic transmission distance in 1957. To the contrary, congressmen acknowledged that economic transmission distances were mutable, S. Hearings, *supra*, at 176 (Dialogue between Sen. Cotton and Thomas Moore, Counsel for New York Power authority); *id.* at 15 (Sen. Ives), and rejected a suggestion that § 836(b)(2) be amended to provide that Niagara power would only be available to the portions of "neighboring states" within 300 miles of the Project. 103 Cong.Rec. 13196-97. Several congressmen stated that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance. 103 Cong.Rec.

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9. S. Hearings, *supra*, at 26, 56 (Rep. Miller) (150 miles); *id.* at 131 (Robert Moses, Chairman of the New York Power Authority) (same); *id.* at 176 (Thomas Moore, General counsel, New York Power Authority) (same); 103 Cong.Rec. 13196 (Rep. Blatnik) (same); *id.* at 13196 (Rep. Chudoff) (150-300 miles); *id.* at 13198 (Rep. McGregor) (150-400 miles); *id.* at 14440 (Sen. Clark) (150-300 miles); *id.* at 14443 (Sen. Javits) (150 miles).

10. *See also* 103 Cong.Rec. 13195 (Rep. Buckley); *id.* (Rep. Blatnik); *id.* at 13198 (Rep. McGregor); *id.* at 13205 (Rep. Kluczynski); *id.* at 13206 (Rep. Ostertag); *id.* at 13208 (Rep. Flood); *id.* at 14439 (Sen. Ives); *id.* 14439-40 (Sen. Clark); *id.* at 14445 (Sen. Neuberger); *id.* at 14454 (Sen. Carroll); *id.* at 14450 (Sen. Kerr); *id.* at 14455 (Sen. Martin); *id.* at 14452 (Sen. Lausche).

13204 (Rep. Miller states Massachusetts would receive power if it could prove it was within economic transmission distance); *id.* at 13198 (Letter read into record responding to Sen. Clark's claim that Niagara power could be sold to preference customers in Michigan); *id.* at 13211 (Rep. McGregor suggests Indiana could receive Niagara power). *See also* S. Hearings, *supra*, at 131 (Robert Moses notes that Massachusetts and New Hampshire decided not to request Niagara power because they were not within economic transmission distance). Senator Chavez expressed the hope that Niagara power would lower power rates and increase electricity use in New England and "a large part of the northeastern section of our country", 103 Cong.Rec. 14438, strongly suggesting that he intended Niagara Project power to be available to portions of "neighboring states" other than the northwestern corner of Pennsylvania and the northeastern tip of Ohio.

The Amount of Power PASNY Must Allocate to Preference Customers Outside New York

Allegheny argues that PASNY is required as a matter of law to sell 10% of the Niagara Project power to preference customers outside of New York, so long as those customers are willing to buy the power. PASNY, on the other hand, relying on the language of 16 U.S.C. § 836(b)(2), which obligates PASNY to make available to preference users outside of New York a "reasonable portion of the project power" not to exceed 10%, takes the position that 10% is not so mandated at all times since a reasonable portion might sometimes be less than 10%. The issue is rendered currently academic for the reason that FERC and PASNY both agree that at the present time it would be unreasonable for PASNY to sell less than 10% of the Project's power to out-of-state customers. All parties, therefore, conceded that PASNY must presently sell 10% of the Project power out-of-state. Accordingly, Allegheny's appeal amounts to no more than a request for a declaration that its construction of § 836(b)(2) is more rational than that of FERC or PASNY. Since to do so would be a mere academic exercise that could not "affect the

result as to the thing in issue in the case," *Village of Ilion v. FERC*, 790 F.2d 212, 217 (2d Cir. 1986) (quoting *California v. San Pablo & Tulare Railroad*, 149 U.S. 308, 314, 13 S. Ct. 876, 878, 37 L.Ed. 747 (1893)), we dismiss Allegheny's argument as moot.

Finally, CMEEC contends that FERC erred in failing to order PASNY to sell to MMWEC and CMEEC an extra allotment of Niagara power to compensate it for PASNY's past failure to sell them Niagara power that they had a right to buy. FERC denied CMEEC and MMWEC retroactive relief for the reason that, since the pool of preference power is finite, granting CMEEC and MMWEC an extra allotment would take power from the pocket of other preference customers and thus improperly penalize them for a wrong which PASNY, not they, had committed.

Though FERC's remedial actions must "be reasonably commensurate with the needs of the case," and their purpose must not be "to punish or confer a windfall on the complainant," it has "broad discretion in determining what relief is appropriate to remedy a violation of the NRA." *Power Authority of the State of New York, supra*, 743 F.2d at 112. *See also Niagara Mohawk Power Corp. v. Federal Power Com'n*, 379 F.2d 153, 159 (D.C.Cir.1967). We do not believe that FERC abused its discretion in the present case. FERC's decision, that preference customers (and the end-users they serve) should not suffer because at some time in the past PASNY sold them power which should have gone to CMEEC and MMWEC, is reasonable. CMEEC's suggestion that those customers were somehow at fault because they applied to PASNY for the power does not alter our view.

CONCLUSION

We affirm FERC's holding (1) that, for purposes of 16 U.S.C. § 836(b) "public bodies" are "publicly-owned entities capable of selling and distributing power directly to consumers of electricity at retail", *not* consumers or brokers, (2) that Connecticut and Massachusetts are "neighboring states", and (3) that CMEEC and MMWEC are not entitled to retroactive relief for PASNY's past failure to sell them Niagara power. We dismiss as moot Allegheny's claim that PASNY is required, as a matter of law, to sell 10% of the power produced by the Niagara Project to preference customers outside of New York.

Order of the Second Circuit, filed August 6, 1986

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of August one thousand nine hundred and eighty-six.

Docket Nos. 85-4115, 85-4149, 85-4151,
85-4153, 85-4159, 85-4165

METROPOLITAN TRANSPORTATION AUTHORITY, POWER AUTHORITY OF THE STATE OF NEW YORK, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, ALLEGHENY ELECTRIC COOPERATIVE, INC., NEW JERSEY BOARD OF PUBLIC UTILITIES, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, AND MASSACHUSETTS ELECTRIC COMPANY,

Petitioners,

—against—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE, VERMONT DEPARTMENT OF PUBLIC SERVICE, ALLEGHENY ELECTRIC COOPERATIVE INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CITY OF CLEVELAND, OHIO, NEW JERSEY BOARD OF PUBLIC UTILITIES, BETHLEHEM STEEL CORPORATION, BOROUGH OF LANDSDALE, ARLENE VIOLET, ATTORNEY GENERAL OF RHODE ISLAND AND RHODE ISLAND PUBLIC

(Caption continues on next page)

UTILITIES COMMISSION, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, MASSACHUSETTS ELECTRIC COMPANY, AND SUSSEX RURAL ELECTRIC COMPANY,

Intervenors.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Intervenor: ALLEGHENY ELECTRIC COOPERATIVE INC.

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

FERC Opinion No. 229-A, issued July 30, 1985

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 229-A

Docket No. EL80-19-000, -004, -005, -006, -007, -008, -009, -011, -012, -013, -014, -015, and -016

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL80-24-000, -003, -004, -005, -006, -007, -009, -010, -011, -012, -013, and -014

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL78-24-029, -032, -033, -034, -035, -036, -038, -039, -040, -041, and -042

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

OPINION AND ORDER ON REHEARING CLARIFYING DECLARATORY OPINION IN PART, AND GRANTING PETITIONS TO INTERVENE OUT OF TIME

ISSUED: JULY 30, 1985

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

In Opinion No. 229, 30 FERC ¶ 61,323 (March 27, 1985), we determined that the Power Authority of the State of New York (PASNY) had failed to allocate a reasonable amount of low cost hydropower from the Niagara Project No. 2216 for "public bodies" and nonprofit cooperatives in states neighboring New York. We further defined the term "public bodies" as "publicly-owned sellers and distributors of electricity at retail," thereby determining that neither the Vermont Department of Public Service (VDPS) nor the Metropolitan Transportation Authority (MTA) could qualify as a "public body" within the purview of the Niagara Redevelopment Act (NRA). While we did not order any retroactive relief, we instructed PASNY that on July 1, 1985, it must make available to preference customers in states neighboring New York ten percent of every classification of Niagara power and energy sold, and to allocate that power and energy among those customers according to the respective numbers of domestic and rural consumers.

On April 24, 25, and 26, 1985, the parties,[1] and three movants for late intervention,[2] filed requests for rehearing pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713. On May 15, 1985, the Rhode Island Attorney General and Public Utilities Commission (Rhode Island PUC) filed a motion for leave to intervene out of time and a motion to join in some of the requests for rehearing that had

1. Rehearing petitions were filed by the New York Industrials (as identified in note 4 of Opinion No. 229), the Metropolitan Transportation Authority, the Power Authority of the State of New York, the Vermont Department of Public Service, Connecticut Municipal Electric Energy Cooperative (CMEEC), the Massachusetts Group (as identified in note 2 of Opinion no. 229), Allegheny Electric Cooperative, Inc. (Allegheny), and Massachusetts Municipal Wholesale Electric Company (MMWEC). In this Opinion, these petitions will be cited as (Party's) Rehearing at .

2. Public Service Electric and Gas Company (PSE&G), the New Jersey Board of Public Utilities (NJBPU), and Rockland Electric Company (Rockland) sought rehearing and moved to intervene out of time. Atlantic City Electric Company (Atlantic City) moved to intervene out of time, but did not petition for rehearing.

already been filed. We granted rehearing on May 22, 1985, for the limited purpose of allowing sufficient time to consider the numerous significant issues raised in these petitions for rehearing. 31 FERC ¶ 61,215. At the same time, we denied a request for a stay of the effective date of Opinion No. 229. *Id.*

NJBPU and Rhode Island PUC are designated state bargaining agencies. They each assert that they have negotiated with PASNY to purchase preference power beginning in July 1985, which they intend to distribute to all residential electric consumers in their state. They claim they made these arrangements in reliance upon *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 F.P.C. 1109 (1976) *(Vermont)*. Noting that Opinion No. 229 will preclude them from purchasing power for distribution through investor-owned utilities, they request permission to intervene at this time. The other three movants for late intervention are investor-owned utilities in New Jersey that wish to obtain for their customers some of the low cost hydropower through NJBPU.

Although we find that these interests are adequately represented here by PASNY, the other state bargaining agencies, and other investor-owned utilities, we will grant these untimely motions to intervene because Opinion No. 229 overruled, in relevant part, our *Vermont* decision upon which these movants claim reliance. Moreover, since they were not purchasers of Niagara preference power during the 1980-1985 contract period that was initially the focus of this proceeding, we understand why they did not move to intervene more promptly. Under the circumstances, we find they have demonstrated good cause for failing to intervene in a timely manner. Late intervention at this stage will simply permit the three of these parties who filed timely petitions for rehearing to be heard now and to seek redress of their grievances in a court of appeals,[3] and will not disrupt the proceeding or otherwise burden the existing parties.

3. Rhode Island PUC's untimely motion to "join in" the timely petitions for rehearing cannot be granted, however. The Federal Power Act (FPA), 16 U.S.C. § 8251(a), has a strict thirty-day deadline for rehearing petitions, which cannot be extended. *Cf.* Montana-Dakota

I. OPINION NO. 229 PROPERLY CONSTRUED THE NIAGARA REDEVELOPMENT ACT.

Opinion No. 229 is criticized as being internally inconsistent for interpreting "neighboring States" according to its plain meaning, while resorting to legislative history to restrict the asserted plain meaning of "public bodies." Allegheny Rehearing at 6-8; Boston Edison Rehearing at 17; and PASNY Rehearing at 4. Seven petitions for rehearing request the Commission to reverse its definition of the term "public bodies," and to interpret the phrase broadly according to common usage. Bethlehem Steel Rehearing at 2; Boston Edison Rehearing at 17; MTA Rehearing at 7; NJBPU Rehearing at 6-8; PASNY Rehearing at 3-4; Rockland Rehearing at 7; VDPS Rehearing at 8-14. However, because we followed the same fundamental principles of statutory construction in interpreting both terms, these holdings are internally consistent.

A. "Neighboring States" Was Correctly Defined According to Its Plain Meaning.

The *Vermont* decision, 55 F.P.C. at 1113, construed the NRA according to its plain meaning. Although we recognized in Opinion No. 229 that an agency may change its interpretation of a statute over time, so long as the new interpretation is consistent with Congressional intent, slip op. at 12, we did not invoke this power lightly. Rather we were mindful that "any departure from the doctrine of *stare decisis* demands special justification," *Arizona v. Rumsey*, 104 S. Ct. 2305, 2311 (1984). Opinion No. 229 therefore reviewed both the rationale of the *Vermont* decision and subsequent judicial precedent interpreting the NRA to determine whether any special circumstances compelled abandonment of our interpretation of the term "neighboring States" according to its plain meaning.

Our analysis in *Vermont* and in Opinion No. 229 started with the language of the NRA itself, as it must. *Watt v. Alaska*, 451

Utilities Co. v. FERC, 739 F.2d 376, 380 (8th Cir. 1984) (Natural Gas Act).

U.S. 259, 265 (1981). A literal reading of "neighboring States" did not "produce a result demonstrably at odds with the intentions of the drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). "The circumstances of the enactment" did not persuade us "that Congress did not intend words of common meaning to have their literal effect." *Watt*, 451 U.S. at 266. Rather, our review of the legislative history convinced us that Congress did not intend to restrict this commonly-understood broad term to refer only to Ohio and Pennsylvania.[4] We did not find that the use of the literal meaning of the phrase "neighboring States" would lead to "absurd results" or would otherwise "thwart" the obvious purpose of the statute. Opinion No. 229,

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4. We are unable to agree with Allegheny's argument:

> Ohio and Pennsylvania were the only two States of the nine States which supply the waters which flow over the Niagara Falls, which were then and are now so geographically located as to receive the Niagara power. Not one drop of water flows from any of the New England States to the Niagara River, nor from any other State which borders New York .... [T]his fact caused Congress in the legislative history to include only Ohio and Pennsylvania in the term 'neighboring States.'"

Allegheny Rehearing at 12. While Allegheny's citations, *id.* at 13-14, establish that the regional character of the Niagara resource caused Congress to require the exportation from New York of some of the power to states including Ohio and Pennsylvania, they do not support Allegheny's contention that Congress limited the availability of the power "only" to Ohio and Pennsylvania. Indeed, Allegheny admits that those two states do not alone supply the water for Niagara Falls. *Id.* at 12. During the House debate on the compromise bill, Congressman McGregor of Ohio referred to Indiana twice as a potential recipient of Niagara preference power. 103 Cong. Rec. at 13,211 (July 31, 1957). Allegheny's claim that "neighboring States" means "only Ohio and Pennsylvania" is inconsistent with Congressman McGregor's statement and the other portions of the legislative history cited in Opinion No. 229, and is also inconsistent with Allegheny's past actions procuring preference power on behalf of a nonprofit cooperative in New Jersey.

Furthermore, the 1957 hearings on the Clark and Ives-Javits bills establish that PASNY was looking toward the east to sell Niagara power, rather than to the south and west beyond Pennsylvania and Ohio, but Massachusetts and New Hampshire dropped out after their consultants determined that they were not then within economic transmission distance. Hearings at 116-17.

slip op. at 9, *quoting Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965). We were convinced that "Congress meant what it said," and that the legislature did not suggest an intent contrary to the words chosen by Congress. *Id.* Accordingly, we deferred to the supremacy of the legislature, *see United States* v. *Locke*, 105 S. Ct. 1785, 1792 (1985), recognizing that the legislative purpose is generally expressed by the ordinary meaning of the words Congress uses. *Richards* v. *United States*, 369 U.S. 1, 9 (1962).

B. "Public Bodies" Must Be Defined In the Context of the Statute and its History.

The analysis of the term "public bodies" did not begin any differently. Both *Vermont*, 55 F.P.C. at 1113, and the initial decision in this case, Initial Decision at 21, read "public bodies" broadly, finding that construction consistent with the purposes of the statute. They each treated VDPS as a "public body" under the NRA because VDPS was causing the Niagara preference power it acquired to be distributed to all domestic and rural customers in Vermont, a result that was deemed to achieve the purpose of the NRA.

When *PASNY* v. *FERC*, 743 F.2d 93 (2nd Cir. 1984), rejected PASNY's contention that the NRA's preference power was to be resold exclusively to such consumers, and instead determined that Congress had created a federal-type preference, not an end-use preference, *id.* at 104-05, the Second Circuit provided the "special justification" compelling us to depart from our prior literal interpretation of the term "public body," and to seek guidance from the legislative history in determining congressional intent. *See Arizona*, 104 S. Ct. at 2311.[5]

5. Contrary to the contentions of Boston Edison at 8, NJBPU at 11-12, and VDPS at 14 and 17, we did not read the Second Circuit's decision to be determinative on the key question presented here: What did Congress mean when it used the term "public bodies" in the NRA? We were well aware that issue was not presented in the *PASNY* case, and would be resolved first in this proceeding. Thus, while the Second Circuit's opinion dictated the reappraisal, the court's decision did not compel us to reach any specific conclusion. Rather, it was our own reevaluation of the statute and its legislative history in this case which dictated the result we reached. *See* Opinion No. 229, slip op. at 13-15.

The term "public bodies" is not as unambiguous as the parties suggest.[6] The Supreme Court has held that "nominal public entities" can be public bodies in order to obtain bond financing without being "transform[ed] into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election." *Ball* v. *James*, 451 U.S. 355, 368 (1981) (footnote omitted). Thus, the question is not how the dictionary defines the term, but how it should be understood in context.

Since the *PASNY* opinion determined that this was a federal-type preference, 743 F.2d at 105, we analyzed how this federal-type preference developed in other statutes. Opinion No. 229, slip op. at 13-14.[7] We found that Congress used the term "public

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At the same time, however, there was no reason we should have refrained from taking advantage of the court's analysis of the legislative history. As the Supreme Court explained in *Aaron* v. *SEC*, 446 U.S. 680, 689-90 (1980), even when the issue presented in the present case was expressly reserved in a prior case, "we nonetheless must be guided by the reasoning of that decision."

6. In *PASNY*, the Second Circuit identified yardstick competition as a key goal of Congress in the NRA. 743 F.2d at 105. If we were to adopt the definition of "public body" that MTA advances, Rehearing at 9, that is, a "group of individuals organized to serve people or some community interest affecting people," we would be permitting Congress' intent to be circumvented. Such a broad distribution of preference power would reduce the efficacy of this preference power to act as a competitive spur.

7. In Opinion No. 229, we relied in part on the fact that the Bonneville Power Act "appears to limit the meaning of 'public bodies' to *distributors* of electric energy." Slip op. at 13 (citing 16 U.S.C. § 832c(d)) (emphasis in original). MTA disagrees, noting that the Bonneville Act's definition of "public bodies" includes state agencies. MTA Rehearing at 16. MTA claims that the "reasonable time" provision we cited was only intended "to assure that potential intended recipients of preference power who were at the time of enactment not yet physically capable of receiving that power did not lose their right to receive the power because of the initial unreadiness." *Id.* at 18. MTA concludes that "[t]here is nothing in the reasonable time provision which requires the conclusion that public bodies had to be distributors." *Id.* at 19. We disagree. As the Attorney General's decision cited in Opinion No. 229, slip op. at 14, recognized, the reasonable time provisions were designed to permit preference customers to purchase preference power "on condition that such customer will, within a reasonable time to be fixed by the Secretary [of the Interior], obtain the means for taking and delivering the power." 41 Op. Att'y Gen. 236, 244 (1955).

bodies" to refer to municipal utilities, that is, "publicy-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Id.* at 14.[8] Any other interpretation of "public bodies" would lead to absurd results and would thwart the purposes of the NRA, as those purposes have been defined by the Second Circuit in *PASNY*.

While the statute permitted the allocation of preference power for sale to investor-owned utilities in periods of surplus, the NRA made clear that investor-owned utility companies are not the intended beneficiaries of the fifty percent of the Niagara Project's power that Congress set aside for preference customers. 16 U.S.C. § 836(b)(1). Congress did not intend to provide preference power to the customers of investor-owned utility companies. Congress believed that these customers would benefit indirectly from the additional competition in the marketplace. *PASNY*,

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Indeed, the legislative history of the Bonneville Act makes a similar point. The House Report, H.R. Rep. No. 2955, 74th Cong., 2d Sess. 3 (1937) makes clear that the Act permits sales of preference power "to States and political subdivisions of States . . . but for the major and primary purpose of supplying electrical energy to their members as nearly as possible at actual cost." Thus, we believe Congress contemplated that preference customers would be retail distributors, not end-users or conduits for the transfer of preference power to investor-owned utilities. *Accord*, Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 Envtl. L. 602, 631-32 (1979).

8. We do not agree with MTA, Rehearing at 24 (quoting 103 Cong. Rec. 14,448 (August 12, 1957)), that Senator Kerr "referred to preference being given to" defense projects and government installations. He said that "municipalities and defense projects or Government installations and REA cooperatives" in New York would like to utilize the preference power almost as much as their counterparts in the nearby areas of Pennsylvania and Ohio. The Clark and Javits bills both proposed an express preference for "defense agencies of the United States." However, as discussed in Opinion No. 229, slip op. at 15, the omission from the NRA of this particular preference, and the particular manner in which the project power was divided, demonstrate conclusively that "defense projects or Government installations" are not included within the purview of the Niagara preference for "public bodies." This is in accord with Congress' treatment of federal agencies under the Flood Control Act of 1944, 16 U.S.C. § 825s, and, according to one commentator, is consistent with Congress' treatment of federal agencies under the Bonneville Act, although that question has not been decided yet. Fereday, 9 Envtl. L. at 637-38 and n. 136.

743 F.2d at 105. Indeed, in construing a similar preference clause in the Reclamation Project Act of 1939, the Ninth Circuit explained that "[i]t is only if the available supply [of preference power] exceeds the demands of interested preference customers that the Secretary [of the Interior] may offer federal power to private entities." *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 670 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978). Moreover, that court found the preference provision was violated by a banking arrangement which permitted a private utility to profit from the low cost of federal power at the expense of a competing preference entity:

> While the stated goal of the banking arrangement is consonant with the preference clause, . . . the propriety of the goal cannot save the scheme if its interim effects are violative of the statute. That may be the case here. Congress intended public entities, whenever possible, to benefit from the sale of low cost federal power. An arrangement which enables a nonpreference entity to reap a benefit which Congress sought to bestow on public entities, even temporarily, flies in the face of that intent.

Id. at 671.

Since the amount of power produced at the Niagara project is limited, and only one-half was designated by Congress to be preference power, we should not construe the preference Congress created so broadly as to transfer the benefit to investor-owned utilities whom Congress explicitly excluded from the class that can benefit. Indeed, as the Supreme Court concluded in *Chemical Manufacturers Ass'n* v. *NRDC*, 105 S. Ct. 1102, 1108 (1985), when a construction of the statutory term in its broadest sense "makes little sense," that term has no plain meaning.

The precatory language of the NRA, 16 U.S.C. § 836(b)(1), speaks of the sale and distribution of preference power "for the benefit of" the people as consumers. MTA asserts that Opinion No. 229 substitutes "for resale to" or "to" for the phrase "for the benefit of." Rehearing at 12. What MTA ignores is the fact that New York interests insisted that the NRA be consistent with

existing New York law,[9] and the further fact that the New York Power Authority Act (now the Public Authorities Law) directs PASNY to sell power to municipalities that "engage in the distribution of electric power." MTA does not engage in the distribution of electric power to consumers at all. Opinion No. 229, slip op. at 15.[10] Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party directly responsible for the needs of the consumers served. *Id.* at 14. Accordingly, we found that neither was entitled in its own right to purchase preference power under the NRA, *id.* at 14-15,[11] and held that the NRA term "public bodies" includes only "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Id.* at 14.[12]

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9. *See, e.g.*, the 1956 opinion of former New York Attorney General Javits, Hearings at 48-54, and the statement of New York Attorney General Lefkowitz, Hearings at 345-47. The House and Senate debates on the compromise bill establish that the New York interests accepted that bill as being consistent with New York law. *See, e.g.*, Cong. Rec. at 14,439, 14,442 (August 12, 1957).

10. MTA contends that our definition of "public bodies" contravenes federal policies in favor of mass transportation and energy conservation. MTA Rehearing at 37. Opinion No. 229 interpreted the NRA in an adjudication to determine and fix the amount of Niagara preference power that PASNY should sell to "public bodies" and nonprofit cooperatives in the states neighboring New York. We found that PASNY improperly diverted to MTA some of the power Congress set aside to satisfy these needs. We continue to believe that the NRA dictates that MTA can make purchases only from the nonpreference half of the Niagara project's output. *See* Opinion No. 229, slip op. at 15.

11. MTA also contends that we have ignored the environmental impact of our interpretation of the NRA to preclude MTA from purchasing preference power from the Niagara Project. MTA Rehearing at 35-36. However, in *Santa Clara*, the Ninth Circuit rejected a similar claim, noting that there can be no absolute quantitative adverse environmental effects when the amount of low cost hydropower is finite and demand for power exceeds the existing power supply. 572 F.2d at 680. Moreover, the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, addresses administrative actions, not complaint proceedings in which the Commission construes a statute. *See FPC v. Corporation Comm'n of Oklahoma*, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974).

12. Opinion No. 229 inadvertently stated that VDPS was not a "public body" because it does not own a distribution system. Slip op. at 14. Since an ownership requirement has not been Commission policy in

VDPS' argument, Rehearing at 17-20, that the NRA explicitly permits it to purchase preference power on behalf of the State of Vermont distorts the provision for the establishment of bargaining agencies, and renders subsection 1(b)(2), 16 U.S.C. § 836(b)(2), internally inconsistent. The concept of a "bargaining agency" in the NRA is designed to promote efficiency, *see* Opinion No. 229, slip op. at 11, not to modify the carefully-crafted preference provisions of the Act. The reference in subsection 1(b)(2) of the NRA to the sale of power "to or in such States," and the reference in the preceding sentence to the procurement of power "on behalf of such State," were simply shorthand ways of referring to the "public bodies and non-profit cooperatives" within the state.[13] Thus, rather than requiring each preference customer to bargain individually with PASNY, the NRA permits the state to designate a bargaining agency to act on behalf of the preference customers.[14]

Finally, it appears that Vermont once so understood this provision. Soon after passage of the NRA, VDPS' predecessor may have been concerned that it would not qualify to purchase preference power. The existing state law, 30 V.S.A. § 211, required it to resell power "without preference or discrimination," including

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the past, *see, e.g., Town of Massena* v. *Niagara Mohawk Power Corp.*, 13 FERC ¶ 63,036 (1980), *complaint withdrawn and decision vacated as moot*, 20 FERC ¶ 61,406 (1982), and we did not intend to create a new prerequisite in Opinion No. 229, we are hereby correcting Opinion No. 229 in this respect. In all other respects, however, we stand by the definition of "public body" set out in Opinion No. 229. On the present record, we cannot determine whether the Vermont legislature's recent actions, 30 V.S.A. § 212a, on April 23, 1985, will enable VDPS to qualify as a "public body" under the NRA. We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

13. This is illustrated through statements of Congressman Blatnik of New York. He described the compromise bill, 103 Cong. Rec. at 13,195 (July 31, 1957), stating that fifty percent of the power "will go to rural electric cooperatives and the municipalities of the State of New York," and that "up to 20 percent of such preference power may be sold to preference customers outside the State of New York." But, *id.* at 13,197, he said, "The different States shall thus be given the power."

14. The state may designate a governmental body or even one of the preference customers to act as the bargaining agency.

resale to privately-owned utilities. Exhibit No. 255. The statute was supplemented to eliminate this requirement, 30 V.S.A. § 212, and to authorize VDPS' predecessor to purchase Niagara power and to offer it for "resale . . . in accordance with the terms of said federal legislation and federal license." Exhibit No. 38 at 4. Concern about compliance with the NRA apparently was also the reason why the initial application filed by VDPS' precedessor for Niagara preference power requested power only on behalf of the state's municipally and cooperatively-owned utilities. Exhibit Nos. 141 and 34. *See also* Tr. 3023-3024.

C. Ten Percent of the Niagara Power Should Be Sold to Preference Customers in Neighboring States.

1. *Opinion No. 229 Properly Established A Reasonable Allocation of Preference Power To the Neighboring States on the Basis of the Facts in the Record.*

PASNY also invokes the plain meaning of the NRA in support of its claim that Congress gave it authority to determine, in its discretion, how much power it should export to the neighboring states. PASNY Rehearing at 26-28. Moreover, PASNY claims that the Commission previously determined that "the Power Authority's obligation to provide a reasonable portion of preference power, up to 10%, to out-of-state customers in fact vests 'maximum' discretion in the Power Authority." *Id.* at 27 (quoting *Municipal Electric Utilities Ass'n* v. *PASNY*, "Order Granting in Part And Denying in Part Motions for Summary Judgment, Providing for Expedited Hearing, and Consolidating proceedings," 9 FERC ¶ 61,128 at p. 61,248 (1978)). However, the portion of that order which PASNY quotes discusses a portion of the Ives-Javits bill that was rejected by Congress. While Opinion No. 229 does not disagree with PASNY's contention that it has discretion in the first instance to fix the portion of the power to be exported, it rejects the notion that the Commission can abdicate all responsibility to review the reasonableness of PASNY's allocation decisions. Slip op. at 5.

PASNY also disputes Opinion No. 229's factual conclusion that PASNY acted arbitrarily and unreasonably when it sold "preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA." *Id.* at 6. PASNY claims that "the very circumstances which the Commission relied on in awarding the full ten percent were present in more exaggerated form when Congress passed the NRA, in that even less preference power could be used by in-state preference customers in 1957 than is used today." PASNY Rehearing at 28. While PASNY is correct with respect to the needs of New York State preference customers, its factual analysis is incomplete because it ignores the radically different situation in the neighboring states. In this proceeding it became clear that preference customers in neighboring states need the full ten percent of the Niagara power that congress set aside, and it is not disputed that it is economic to export the full amount to them. Yet, at the time the NRA was enacted, there was uncertainty whether it would be economic to transport any of this power to the neighboring states.[15] It was the fact that the preference customers in the neighboring states needed the maximum amount available to them, while the New York State preference customers did not, which led us to modify PASNY's allocation for the neighboring states. Opinion No. 229, slip op. at 5-6. These circumstances differ significantly from the factual situation before Congress when it enacted the NRA.[16]

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15. Subsequent facts demonstrate that this concern was justified. In October 1960, four months before the Niagara project was placed into operation, VDPS' predecessor applied for a reservation of 180 MW of firm power, then considered to be all to the neighboring states' preference power, and requested receipt of this power over time, based on the needs of the preference entities in Vermont. Exhibit Nos. 141 and 34. Although PASNY rejected the application, it sold 50 MW for use in Vermont on June 20, 1961. Exhibit No. 45. Five years later, on July 26, 1966, PASNY entered into a contract with Allegheny to sell an additional 100 MW of preference power for use in Pennsylvania, bringing the total sale to neighboring states to 150 MW, still less than ten percent of the project power.

16. While we were unconvinced by Allegheny's contentions that the NRA requires an allocation of the full ten percent of the Niagara power

2. Ten Percent of the Peaking Interchange Energy Should Be made Available to Preference Customers in Neighboring States.

In Opinion No. 229, we interpreted the Commission's 1976 *Vermont* decision, 55 F.P.C. at 1119, as holding that no classification of the Niagara project's power *and energy* should escape the

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to out-of-state preference entities, Opinion No. 229, slip op. at 5, we believe that Allegheny's legal analysis demonstrates that Congress was uncertain in 1957 whether Niagara power could be exportable economically to the neighboring states. *See* Allegheny Brief on Exceptions at 41-46.

In reflecting upon PASNY's disagreement with our factual analysis, we returned to Allegheny's legal analysis. We now believe that our decision to require PASNY to allocate to the neighboring states the maximum amount Congress set aside is correct on the basis of the law as well as the facts. The legislative history confirms that Congress intended the full ten percent of the project power to be exported to the neighboring states if economically feasible.

Despite Congress' desire to allocate twenty percent of the preference power to the neighboring states, the amount of preference power that may reasonably be exported from New York was expressed in Subsection 1(b)(2) as a maximum, rather than as a fixed percentage, because it could not be proved, before the Niagara project was built, whether the power could be transmitted to the neighboring states at a cost that would be lower than the cost of the inexpensive power that was then being generated locally from coal. As Senator Clark conceded, 103 Cong. Rec. at 14,441 (August 12, 1957), "If we can produce power from coal and can sell it for a lesser price than the price for the power we can wheel from Niagara, then we are not within economic transmission distance and we are not entitled to one kilowatt of that power."

Senator Kerr, who authored the compromise bill, explained that New York agreed to give up twenty percent of the preference power—not "up to" twenty percent—because of the emergency that was adversely affecting New York. 103 Cong. Rec. at 14,451 (August 12, 1957). To like effect see Congressman Miller's statement, 103 Cong. Rec. at 13,204 (July 31, 1957); Congressman Blatnik's statement, 103 Cong. Rec. at 13,196 (July 31, 1957); S. Rep. No. 539, 85th Cong., 1st Sess. at 8 (1957). Indeed, in this respect the minority views of Senator Neuberger are in accord with the majority. While arguing that the twenty percent figure was too low an allotment for preference entities in states neighboring New York, Senator Neuberger discussed the NRA as containing an "80-20 division of power between New York and its neighbors." *Id.* at 11. To like effect see H. Rep. No. 862, *reprinted in* 1957 U.S. Code & Ad. News 1585, 1593. Indeed, in FPC v. Tuscarora Indian Nation, 362 US. 99, 104 n.8 (1960) (quoting 16 U.S.C. § 836 (b)(1)), the Supreme Court also noted that Congress resolved the dispute over how to allocate Niagara Project power by conditioning the license, *inter alia*, to require that "at least 50% of the project power must

NRA export requirement. Thus, Ordering Paragraph (F) requires PASNY to make ten percent of "every classification of Niagara power and energy sold" available in neighboring states. But, intending to be consistent with the Initial Decision in *Vermont*, 55 F.P.C. at 1147-48, the order was qualified, slip op. at 22, to give PASNY flexibility to meet firm energy obligations.

MMWEC's petition for rehearing calls out attention to certain testimony to support its claim:

(1) that peaking interchange energy used for support purposes is indeed "sold" to New York customers and

(2) that the benefits of the Niagara energy used for support purposes are retained within New York.

MMWEC Rehearing at 13.[17]

We are persuaded that the Niagara peaking interchange energy that is used to support firm energy obligations on PASNY's system should be included in the overall project energy that is shared with New York's neighboring states. Such energy clearly is sold for consumption within New York.[18]

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be made available to public bodies and nonprofit cooperatives, 'at the lowest rates reasonably possible,' and 20% of that amount must be made available for use in neighboring States."

Finally, during the debate on the compromise bill, Senator Carroll said with respect to Subsection (1)(b)(2), 103 Cong. Rec. at 14,450 (August 12, 1957), "We place a limitation upon the word 'reasonable' appearing in line 19, by the '20 percent' appearing in line 23." That statement is highly persuasive that the NRA compromise sought to define the word "reasonable" and, together with the other statements cited herein, convinces us that the compromise defined the term "reasonable portion" to mean the "economically exportable portion."

17. PASNY witness Pellegrino testified at Tr. 1748 that PASNY's first priority for peaking interchange energy is to serve firm power customers of other PASNY generating facilities when those facilities are out of service. He also testified at Tr. 1735 that when PASNY does so, those customers pay the energy charges for Niagara energy (rather than for the other facilities' energy), plus any applicable transmission charges.

18. As witness Pellegrino testified at Tr. 2005, eighty-seven percent of such energy was used for support purposes in 1981. The exclusion of energy used for support purposes could result in the denial of any peaking interchange energy for neighboring states if sufficient high-cost facilities are taken out of service. Consequently, CMEEC is wrong, Rehearing at 31-32, in saying that this energy could be used for remedial purposes without affecting present and future entitlements.

PASNY should not be denied the flexibility in appropriate circumstances[19] to use for support purposes in New York the share of peaking interchange energy that otherwise would be exported to neighboring states. On the other hand, PASNY should be prepared to make up to such states an equal amount of such energy at the earliest practicable time. Since peaking interchange energy has never been exported to states neighboring New York, we will leave to PASNY in the first instance the task of implementing these principles.

II. THE RELIEF ORDERED IN OPINION NO. 229 IS APPROPRIATE.

A. Opinion No. 229 Correctly Balanced the Equities In Ordering Prospective Relief.

Ironically, parties on both sides of the "public bodies" dispute claim that we erred by giving guidance for the future rather than limiting our remedy to the contract period that was the subject of the complaints which initiated this proceeding. CMEEC urges us to order immediate and retroactive relief. CMEEC Rehearing at 31-33. At the same time, VDPS contends that we lack statutory authority to rule in this proceeding on post-June 30, 1985 allocation questions. VDPS Rehearing at 48-49. (To like effect see Rockland Rehearing at 10-11.)

In our opinion, the NRA imposes no such limitation on our authority to fashion relief. Subsection 1(b)(2) of the NRA confers upon us the authority to resolve disagreements between PASNY and the "power-marketing agencies" of the neighboring states. It permits the Commission, "after public hearings, [to] determine and fix the applicable portion of power to be made available and the terms applicable thereto." 16 U.S.C. § 836(b)(2). Since there is no limitation to the Commission's remedial authority, this authority should be read broadly to enable the Commission to enforce the conditions in PASNY's

19. "Appropriate circumstances" might include *bona fide* emergencies in New York and situations in which one or more of the neigboring states may be unable to receive the energy when it is available.

license. *See New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 397 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981) (*NYSEG*). The Second Circuit in *PASNY* read the NRA to vest the Commission with such broad discretion in fashioning a remedy as to permit "in an extreme case voiding in whole or part a contract made in violation of that Act." 743 F.2d at 112. If we have authority to void existing contracts that do not conform to our reading of the NRA, we must surely be authorized to provide the parties with guidance in advance so they can execute contracts that will comply with the dictates of the statute. Moreover, in *NYSEG* the Second Circuit held that the NRA did not divest the commission of its usual FPA authority and responsibility "to assure that its licensee complies with other conditions of its license." 638 F.2d at 397. The FPA includes the authoritiy to issue any order we find appropriate to carry out the purposes of the FPA. 16 U.S.C. § 825h. In this case, we issued a declaratory order interpreting the terms of the Niagara Project's license, which incorporates the NRA.

Although we found that PASNY's sales of preference power to VDPS and MTA violated the NRA and PASNY's license, we declined to grant retroactive relief in Opinion No. 229 because we concluded that "it would be unduly punitive to reduce the allocations of customers which were not at fault." Slip op. at 21. Concern about the equities of the relief ordered was mandated by the Second Circuit. *See PASNY*, 743 F.2d at 112. Moreover, the standard we applied here to determine whether to apply this decision retroactively was similar to the test that we used to determine whether to apply retroactively other decisions of first impression not clearly foreshadowed by earlier cases. *See, e.g., Eagle Power Co.*, 28 FERC ¶ 61,061 (1984). *See also Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

Our decision not to interrupt existing contractual arrangements that were about to expire, however, does not require the perpetuation of illegal arrangements into new contract periods.

VDPS has not been deprived of any beneficial interest. The very chapter from Priest, *Principles of Public Utility Regulation*, that VDPS cites in support of its claim that electric utilities have an obligation to continue service, VDPS Rehearing at 43 and n.39, states unequivocally, "The utility patron plainly has no vested right in the service provided." 1 Priest, *Principles of Public Utility Regulation* 244 (1969) (footnote omitted). Thus, VDPS is wrong when it claims a "beneficial interest" in the Niagara power. To the extent VDPS may have overpaid for the Niagara power it has already received, VDPS Rehearing at 5-6, its remedy must be obtained from PASNY directly, not from the other preference customers who never received any of these overpayments and may have already been deprived of preference power to which they were entitled.

VDPS had notice as long ago as 1977 that a reevaluation of PASNY's allocation of power to the neighboring states would take place in 1985. Exhibit 52 at Exhibit C, p. 10. Indeed, on January 10, 1980, in approving the contracts that will expire on June 30, 1985, Governor Hugh L. Carey of New York stated,

> Each of the present contracts will expire on June 30, 1985, the expiration date of the existing contract for the sale to Vermont of 100 megawatts of power from the Authority's St. Lawrence Project. This will permit the Authority to evaluate all requests for out-of-state allocations of Niagara and St. Lawrence hydropower at the same time on a common basis. It will also provide the beneficiaries of the contracts now before me with time to make alternate arrangements for the purchase of power in the event their allocations are reduced in order to help meet the energy needs of more of New York's neighbor states.

Exhibit 62, p. 1-2.

Finally, the abandonment concept upon which VDPS relies, Rehearing at 41, does not prevent us from resolving these questions of statutory construction in the manner we have chosen. Abandonment authority is a fundamental part of the Natural Gas Act (NGA), 15 U.S.C. § 717f(b), not the FPA or the NRA.

Indeed, the very natural gas cases VDPS cites make clear the Commission's authority to approve abandonment of service stems from the provisions of the NGA.[20] *See, e.g., Public Service Co. of North Carolina* v. *FERC*, 587 F.2d 716, 719 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979). Where, as here, similar statutes have different provisions, each statute must be interpreted on its own. Just as the court in *Middle South Energy, Inc.* v. *FERC*, 747 F.2d 763, 768 (D.C. Cir. 1984), *petition for cert. filed sub. nom. City of New Orleans v. Middle South Energy, Inc.*, 53 U.S.L.W. 3778 (U.S. April 22, 1985) (No. 84-1668), concluded that it could not ignore the existence of the word "such" in section 205(e) of the FPA, 16 U.S.C. § 824d(e), and its absence in the parallel provision of the Interstate Commerce Act, we should not ignore the presence of abandonment authority in the NGA and its absence in the FPA.

B. *Opinion No. 229 Developed a Reasonable Allocation Methodology.*

VDPS next contends that we failed to make a reasoned allocation decision in Opinion No. 229. VDPS Rehearing at 41. Others assert that we acted arbitrarily and inconsistently in allocating preference power on the basis of the precatory language while refusing to use that same language as the basis for fashioning entitlement criteria. Bethlehem Steel Rehearing at 5-6; Boston Edison Rehearing at 13-14; CMEEC Rehearing at 8-9. We disagree. Opinion No. 229 will channel low cost hydropower to the entities specified by Congress. Congress sought to use one-half of the low cost hydropower produced by the Niagara project to stimulate competition in an otherwise monopolistic market. Yet Congress imposed a limit on the amount of power that could be used for this purpose. However, we believe Congress gave us

20. We generally refuse to apply natural gas concepts to electric utility proceedings without a critical inquiry into the possible differences between the two schemes of regulation, *see, e.g.*, Delmarva Power & Light Co., 25 FERC ¶ 61,02_ at 61,121 (1983), as the United States Court of Appeals for the District of Columbia Circuit recently noted with approval. Mississippi River Transmission Corp. v. FERC, No. 84-1046, slip op. at n. 15 (D.C. Cir. April 19, 1985).

discretionary authority to allocate the Niagara power among the class of beneficiaries Congress established. Opinion No. 229 does so in a manner that will give effect to Congress' stated expectation that domestic and rural consumers should be the beneficiaries of this preference power.

CMEEC claims that the allocation methodology we chose "is at variance with the practical background and legislative reference points brought home in the Second Circuit decision," CMEEC Rehearing at 23. Quoting *PASNY*, 743 F.2d at 105, CMEEC's Rehearing at 24 claims that the NRA was mainly concerned with ensuring that the needs of industry were met. However, the portion of the *PASNY* decision CMEEC cites relied upon Senator Chavez's statement pertaining to the emergency situation in the Niagara-Buffalo area—not all industry served by preference customers. This emergency was remedied through the statutory allocation of replacement power in Subsection 1(b)(3), 16 U.S.C. § 836(b)(3).

Our allocation of preference power according to the total number of domestic and rural consumers, rather than according to total loads, favors preference customers that resell preference power to domestic and rural consumers. We have exercised our discretion on the basis of Congress' expressed expectation of whom the ultimate beneficiaries ought to be. 16 U.S.C. § 836(b)(1).

PASNY contends that we erred when we narrowed the definition of the terms "domestic" and "rural" in *Vermont*. PASNY Rehearing at 21-23. While *Vermont* permitted resale of preference power to commercial and industrial consumers, 55 F.P.C. at 1116, so does Opinion No. 229. The Second Circuit has clearly established that the NRA does not bar such resale, *PASNY*, 743 F.2d at 104-05, as Opinion 229 acknowledges. Slip op. at 17. The allocation decision of Opinion No. 229, however, was not limited in any way by our analysis of the terms "domestic" and "rural" in *Vermont*. Since we found that there was insufficient preference power to serve all the needs of all the parties entitled to receive that power, in contradistinction to the situation in

PASNY, 743 F.2d at 104, on the basis of our discretion we decided to allocate this power in a manner which would create an incentive for preference customers to resell this power to achieve Congress' stated expectation.

We thus wish to make clear that PASNY should only count the domestic and rural consumers served by preference entities that assert an interest in sharing in the preference allotment and are capable of receiving preference power. *See* PASNY Rehearing at 24.[21] Each of the domestic and rural consumers served by these preference entities should be counted, whether they are individually metered or not. Our inability to impose an end-use restriction prevents us from dictating that these preference customers must resell the preference power they receive to reduce the rates of their domestic and rural customers. Preference customers may resell the preference power as they wish, so long as they comply with the dictates of the NRA.

THE COMMISSION FURTHER FINDS:

The assignments of error and grounds for rehearing set forth in the requests for rehearing filed April 24, 25, and 26, 1985, present no facts or legal principles which warrant any change in or modification of the Opinion and Order issued in these dockets on March 27, 1985, except as that opinion and order is clarified herein.

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21. Although PASNY requests clarification of whether the allocation of preference power and energy based on numbers of domestic and rural consumers may be adjusted during an unspecified "transitional period" on the basis of showings of "severe economic dislocation or rate shock," Rehearing at 25-26, we find insufficient good cause to permit such a transition period. If ten percent of the project power and energy is allocated among the neighboring states, and if the preference customers within those states within economic transmission distance can use the power and energy, as to which we have no doubt, no additional preference power and energy can be made available for one state without having an adverse impact on the amount available for the other states. The potential gainers, Massachusetts and Connecticut, have waited long enough, and a large potential loser, Vermont, has enacted a statute that may minimize its potential losses.

THE COMMISSION ORDERS:

(A) Public Service Electric and Gas Company, the New Jersey Board of Public Utilities, Rockland Electric Company, Atlantic City Electric Company, and the Rhode Attorney General and Public Utilities Commission are permitted to intervene herein pursuant to Rule 214, 18 C.F.R. § 385.214; *provided*, that their participation as intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions to intervene; and, *provided further*, that their admission as intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding, and, *provided further*, as set forth in Rule 214 (d)(3)(ii), that they accept the record of this proceeding as it was developed prior to the late interventions.

(B) The Rhode Island Attorney General's and Public Utilities Commission's motion to join in some of the timely petitions for rehearing is denied.

(C) The request for oral argument made by the Vermont Department of Public Service is denied.

By the Commission. Commissioner Stalon dissented with a separate statement attached.

(SEAL)

/s/ KENNETH F. PLUMB,
Secretary.

STALON, COMMISSIONER, *dissenting:*

I am not in disagreement with the general thrust of the Commission's Order (Opinion No. 229-A) on rehearing which is to clarify its original Order (Opinion No. 229) in several respects and to respond to specific criticisms of Opinion No. 229 made in the petitions for rehearings. Specifically, I support the majority's opinion on rehearing that Opinion No. 229 correctly defined "neighboring states" and correctly balanced the equities in ordering prospective relief. I also agree with the majority in Opinions

229 and 229-A that the full 10 percent of Niagara preference power, including peaking interchange energy, allocable to "neighboring states" should be so allocated.

However, I wish to continue my dissent in Opinion No. 229 on two major issues, the definition of "public bodies" in the Niagara Redevelopment Act (NRA) and the methodology used for allocation of the 10 percent among the competing "neighboring states," and, in so doing, to clarify exactly what I would propose with respect to these two issues in contrast to what is decided in Opinion Nos. 229 and 229-A.

1. Definition of "Public Bodies" Under the Niagara Redevelopment Act.

Opinion No. 229 defined "public bodies" narrowly to include only "publicly-owned entities that are capable of selling and distributing power *directly to consumers of electricity at retail*". (emphasis provided). As I argued in my dissent to Opinion No. 229, I do not believe that interpretation is compelled by the NRA or its legislative history. Indeed, a plain dictionary meaning of "public body" is *any* government body. I do not, however, propose a definition that broad. I believe that the statute permits, and sound regulatory policy favors, a definition that would encompass any government body that is organized by the state to receive and distribute within that state, in accordance with the terms of the NRA, Niagara preference power allocated to that state. Accordingly, I would eliminate the limitation that the body must engage directly in retail sales to end-use customers. As more fully argued in my dissent to Opinion No. 229, my proposal would eliminate a significant problem with Opinion No. 229, *viz.* that it encourages the construction of uneconomic transmission.

In imposing the direct retail sales limitation, Opinion Nos. 229 and 229-A create an artificial dichotomy, that is not compelled by the statute between "public bodies" and the concept of "bargaining agency." The latter concept in the NRA, Opinion No. 229-A concedes, is designed to promote efficiency. If a state believes it

is more efficient, or otherwise desirable, to combine the two concepts into a single entity in order to receive and distribute Niagara preference power in accordance with the NRA, as the State of Vermont has done in creating the VDPS, I believe it should be permitted to do so. Accordingly, I dissented in Opinion No. 229 insofar as it declared VDPS not a "public body." I agreed, however, that the MTA, which does not have the authority of the State of New York to distribute power at all, is not encompassed in that definition.

The reason for imposing the retail sales limitation in Opinion Nos. 229 and 229-A appears to be a desire to ensure that the "federal-type preference" is enforced and that investor-owned utilities are not the intended beneficiaries of NRA preference power. The Commission's previous efforts to enforce an "end-use preference" in a state's distribution of NRA power proved to be misplaced in light of the decision in *PASNY* v. *FERC*, 743 F.2d 93 (2nd Cir. 1984), that Congress had not intended to create such a preference but rather a "federal-type" preference.

In my view, we should not repeat the mistake of attempting to police a preference, any preference, through a state's power distribution mechanisms but, rather, we should permit appropriate state-appointed distribution entities, such as VDPS, to distribute Niagara power in accordance with the NRA. Moreover, given that there is now no end-use preference to be enforced, an effort to ensure that Niagara preference power be directed only to retail public entities, such as municipal or rural cooperative utilities, and that it not benefit the IOUs or their consumers, will be futile because there is no constraint upon how the municipals or cooperatives could dispose of the power once they received it. Moreover, the NRA itself states that the beneficiaries of Niagara preference power are to be "domestic and rural consumers," a definition so vague and unrelated to any existing theory of preference as to cause skepticism as to whether Congress had a clear preference scheme in mind in the NRA. I do not find compelling the assertion in Opinion No. 299-A that the NRA contains "carefully-crafted preference provisions" (which, as the *PASNY* case

demonstrates, the Commission has already misinterpreted on one occasion).

As more fully argued in my dissent to Opinion No. 229, I do not agree that the goal of providing "yardstick competition" (if that is a meaningful concept in this context at all) justifies the narrow definition of "public body."

2. Methodology for Allocation of Preference Power to "Neighboring States."

The allocation methodology adopted in Opinion 229 would require PASNY to count the number of "rural" and "domestic" customers actually served by each preference entity that assert an interest in receiving Niagara preference power in each state before making the allocation amongst such states of the 10 percent of preference power to be alloted to them. That will require going behind the meters on each municipal or cooperative system in each state and counting the number of customers actually served. I doubt that even the states or utilities themselves have that information available at all, let alone in a form that would permit PASNY, an out-of-state decision-maker, to make the calculation without excessive burden, and to check its accuracy with any assurance. Hence, we are once again imposing unnecessary transaction costs that will serve to reduce the rents to be derived from the allocation of preference power. Moreover, in adopting this methodology, we are in effect imposing an end-use test for allocation that the Circuit Court of Appeals has told us we may not impose in determining which public bodies qualify for receipt of that power.

In the light of these problems, I reiterate the proposal I made in Opinion No. 229, that the allocation be made on the basis of each state's population, as to which some of the most reliable, readily accessible and verifiable data bases are available. That test is far simpler and is equitable. It is, then, preferable on policy grounds and at least as sound legally as the allocaton methodology adopted in Opinion No. 229. I agree with Opinion No. 229-A that the Commission has a broad discretion to make "a reasoned

allocation decision." Under this test, my proposal is fully consistent with the NRA.

The merits of my approach were more fully argued in my dissent to Opinion No. 229, and I will not repeat those arguments here.

/s/ CHARLES G. STALON
Commissioner

FERC Opinion No. 229, issued March 27, 1985

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 229

Docket Nos. EL80-19-000 and -004

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket Nos. EL80-24-000 and -002

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL78-24-029[1]

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

DECLARATORY OPINION AND ORDER AFFIRMING WITH MODIFICATIONS INITIAL DECISION ON NIAGARA PREFERENCE POWER FOR STATES NEIGHBORING NEW YORK

ISSUED: MARCH 27, 1985

1. Pertaining to the issue severed by Opinion No. 151-A issued April 6, 1983, 23 FERC §61,031, for consideration in Docket Nos. EL80-19-000 and EL-80-24.

APPEARANCES

David R. Straus, Scott Strauss, Thomas C. Trauger and Maurice J. Ferriter for Massachusetts Municipal Wholesale Electric Company

James F. Fairman, Jr., Grace Powers Monaco, Barry R. Lenk, Laurie Levin and Robert Sussler for Connecticut Municipal Electric Energy Cooperative

Vincent J. Tobin, Wendy M. Lane, Karen A. Kimmel, Gerald C. Goldstein, Barry Fischer and Thomas R. Frey for Power Authority of the State of New York

Renee Schwartz, Laurens Schwartz and Paul Chessin for Metropolitan Transportation Authority

Edward R. Muller, Lowell D. Turnbull and Edward Berlin for New York State Electric & Gas Company

J. Cathy Lichtenberg, Mark S. Laufman, John Wyeth Griggs and Wallace L. Duncan for Municipal Electric Utilities Association of New York State

William C. Wise, Robert Weinberg and William E. Mowatt for Allegheny Electric Cooperative, Inc.

Reuben Goldberg, Channing D. Strother, Jr., June W. Wiener, Craig A. Glazer and Thomas E. Wagner for City of Cleveland, Ohio and American Municipal Power—Ohio

William I. Harkaway, G. Douglas Essy and Gerald R. Tarrant for The Vermont Department of Public Service and Vermont Public Service Board

Douglas A. Eldridge for New York State Energy Office

Donald F. McCarthy for Consolidated Edison Company of New York, Inc.

Woodrow D. Wollesen for Borough of Lansdale, Pennsylvania

Carmen Gentile and Hay Hickey for Boston Edison Company, Cambridge Electric Company, Commonwealth Electric Company, Eastern Edison Company, Fitchberg Gas and Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company

Richard Miles and Paul Hartley for the Staff of the Federal Energy Regulatory Commission

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Spousa, Oliver G. Richard III and Charles G. Stalon.

I. INTRODUCTION

In 1980, the Massachusetts Municipal Wholesale Electric Company (MMWEC) and the Connecticut Municipal Electric Energy Cooperative (CMEEC) asked us to find that they are entitled to receive power from the Niagara Project, and to fix the applicable portion of power available to them pursuant to Section 1(b)(2) of the Niagara Redevelopment Act (NRA), 16 U.S.C. § 836(b)(2).[2] The Power Authority of the State of New York (PASNY) opposed these complaints contending that it had made a "reasonable" allocation of power for "neighboring States."

The hearing in this case explored how much project power PASNY should sell to neighboring state preference customers, which of the participants in this proceeding are entitled to purchase the power Congress set aside for the needs of neighboring state preference customers and how such power should be allocated to each of those preference customers.

Before the presiding judge issued his Initial Decision, we issued Opinion No. 151 which determined that PASNY had not complied with the NRA in allocating Niagara Project power to meet the reasonably foreseeable needs of New York State preference

2. On September 10, 1980, we consolidated the two proceedings and allowed the intervention of Allegheny Electric Cooperative, Inc. (Allegheny), the City of Cleveland, Ohio (Cleveland), Consolidated Edison Company of New York, Inc. (Con Ed), the Borough of Lansdale, Pennsylvania (Lansdale), the Municipal Electric Utilities Association of the State of New York (MEUA), the New York State Electric & Gas Corporation (NYSEG), the New York State Energy Office and the Public Service Board of the State of Vermont (PSB). During the course of the consolidated proceeding, the presiding judge also allowed the late intervention of American Municipal Power-Ohio, Inc. (AMP-Ohio), the Metropolitan Transportation Authority (MTA), the Rochester Gas and Electric Corporation (RGE), and the following investor-owned utility companies in Massachusetts: Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Eastern Edison Company, Fitchburg Gas & Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company (collectively, the Massachusetts Group).

customers. After an additional round of briefs addressing the impact of that Opinion on the issues presented in this case, on March 9, 1983, before Opinion No. 151 was modified on rehearing by Opinion No. 151-A, the judge issued an Initial Decision in this case. 22 FERC ¶ 63,087 (1983).

The Initial Decision, slip op. at 12-22, identified eight threshold findings as having been previously decided by the Commission:

1. Connecticut, Massachusetts, Ohio, Pennsylvania and Vermont are "neighboring States" within reasonable economic transmission distance of the Niagara project;

2. the NRA does not require PASNY at all times to allocate a full ten percent of project power to out-of-state preference customers;

3. every classification of Niagara project power is subject to the preference provisions of the NRA;

4. the Commission has authority to abrogate existing contracts in fulfillment of its duties under the NRA;

5. the Commission need not defer to PASNY's decision apportioning preference power between New York and its neighboring states but is authorized by the NRA to conduct a *de novo* review of PASNY's out-of-state allocation;

6. MMWEC, as the agent for the designated bargaining agent of Massachusetts, has "standing" to seek an allocation of Niagara preference power;

7. the Vermont Department of Public Service (VDPS) is entitled to an allocation of Niagara preference power; and

8. MTA is not entitled to an allocation of Niagara preference power.

The presiding judge then determined on the basis of record evidence that PASNY should make available to preference customers in neighboring states 10 percent of the project's power, the maximum amount Congress allowed. Initial Decision at 23. While he recognized that the Commission has broad discretion in selecting an apportionment methodology, *id.* at 24, he selected

the method which he found to be most consistent with Congressional intent. *Id.* at 29. After adjusting the staff's figures, *id.* at 31, the presiding judge derived tentative percentage entitlement factors for each applicant. *Id.* at 34. Applying the tentative entitlement factors, he fixed tentative firm and peaking power allocations for each applicant. *Id.* at 35. Finally, the Initial Decision adjusted these tentative allocations to reflect situations in which the preference power could not be transmitted to, or otherwise enjoyed by, the consumers for whom it was intended.[3] However, the judge gave notice that these allocations could be adjusted if these preference entities could perfect their abilities to receive power. *Id.* at 40.

Substantially all of the parties, and a group of new parties that have requested leave to intervene out-of-time,[4] have requested review of the Initial Decision. In reviewing this decision, we will pay careful heed to the instructive opinion of the Second Circuit, which affirmed our determination concerning PASNY's allocation of Niagara Project power in New York State, and only modified our decision with respect to part of the relief ordered. *Power Authority of the State of New York* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) (*PASNY*).

3. In the case of MMWEC and CMEEC, the judge found that there was a west-to-east transmission "bottleneck" in New York that resulted in physical transmission limitations during peak periods and, consequently, precluded firm transmission service for firm preference power. Although MMWEC and CMEEC expressed their willingness to accept firm power on a non-firm transmission basis (*i.e.*, the energy associated with the firm capacity), the Initial Decision declined to make such an allocation and limited MMWEC's and CMEEC's allocations to "non-firm" Niagara energy. Initial Decision at 37-38. Lansdale, which was unable to arrange transmission service for about 1½ miles, was denied any allocation. *Id.* at 36.

4. Bethlehem Steel Corporation, General Motors Corporation, Occidental Chemical Corporation-HOOKER Industrial & Specialty Chemicals, Olin Corporation and Union Carbide Corporation (collectively, the New York Industrials).

II. TEN PERCENT OF THE NIAGARA PROJECT POWER SHOULD BE SOLD TO OUT-OF-STATE PREFERENCE CUSTOMERS.

Section 1(b)(2) of the NRA, 16 U.S.C. § 836(b)(2), requires PASNY to make a "reasonable" portion of the preference power available for use in states neighboring New York,

> but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States.

We have previously interpreted this caveat to mean that 20 percent is the maximum percentage of preference power that may be exported from New York, but that Congress did not require PASNY to sell the maximum amount, only a "reasonable" amount. *State of Vermont Public Service Board* v. *Power Authority of the State of New York*, 55 F.P.C. 1109, 1120 (1976). We took the same position in the orders issued in this case on February 13, 1981, and March 4, 1982, stating in the latter order (emphasis added):

> [W]e reaffirm our holding that out-of-state entities are not always entitled, *as a matter of law*, to allocations aggregating a full ten percent of project power. The *factual issue* of whether a full ten percent allocation to out-of-state entitles or a lesser amount is a "reasonable portion" of project power should be examined in the hearing.

18 FERC ¶61,217 (1982). We remain unconvinced by Allegheny's contentions (Exceptions at 40-46) that the NRA, as a matter of law, requires an allocation of the full 10 percent to out-of-state preference entities.

PASNY asserts, however, that "[t]he plain meaning of the NRA, its legislative history, and prior FERC rulings clearly establish that the amount of Niagara Project power to be allocated out of state is a reasonable amount, as determined by the Power Authority, *up to* 10%." (Exceptions at 14). For the reasons stated by the presiding judge, Initial Decision at 14-16,

we disagree with PASNY's assertion that we must defer to its determination of what is a reasonable amount. In *PASNY*, PASNY made this same claim that it is entitled to more deference than other licensees. *PASNY*, 743 F.2d at 108. While the court found it unnecessary to resolve this dispute there because it found that PASNY had acted arbitrarily and unreasonably, in *dicta*, the court stated that it is "doubtful" that PASNY is entitled to more deference than other licensees, noting that municipalities and state agencies are among the general class of Commission licensees. *Id.* Quoting *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2nd Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), the court noted that the Commission must play an active role in protecting the public interest. *Id.* We believe this obligation can only be met if we independently examine the facts surrounding PASNY's allocation of preference power to preference entities in neighboring states.

The facts of this case convince us that PASNY has not made a reasonable amount of preference power available for preference customers in neighboring states, and has acted arbitrarily and unreasonably in allocating less than 10 percent of the Niagara Project power to out-of-state preference purchasers. PASNY's own projections demonstrate that New York State preference customers would not need 40 percent of the project power until the winter of 1986/1987. Initial Decision at 23, citing Exh. 85, pp. 3-6; Exhs. 86, 87.[5] Under the present circumstances we find

5. PASNY now disputes the presiding judge's factual finding that it is providing New York State preference customers less than 40 percent of the project's power, and claims that it did not protest the introduction of the evidence the judge relied upon because it considered that evidence to be irrelevant to this proceeding. (Exceptions at 15 and n.*). However, in our order of February 13, 1981, 14 FERC ¶ 61,128 (1981), we directed the judge to consider his determination of what constitutes a reasonable allocation for out-of-state preference customers MEUA's claim that the needs of New York State preference customers must be satisfied before there can be any allocation to out-of-state preference customers. We stated that the reasonably foreseeable needs of both classes of preference customers were "inextricably tied." PASNY therefore had adequate notice that we would compare the needs of New York State and out-of-state preference customers in this proceeding. PASNY cannot now, for the first time, protest the judge's use of evidence pertaining to this question.

that PASNY will be acting arbitrarily and unreasonably if it sells preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA. As the presiding judge correctly concluded, *id.* at 23, the congressional intent to allocate 50 percent of the project power to preference customers was defeated by PASNY's allocation decisions.

We further find that the judge was correct in comparing the needs of New York State and out-of-state preference entities. While the NRS explicitly limits out-of-state preference customers to no more than 10 percent of the Niagara Project power, it did not authorize PASNY to discriminate against them. Yet it is clear that PASNY did in fact discriminate against out-of-state preference customers in other ways. Despite the Commission's instruction in *Vermont* that PASNY should allocate all types of power and energy to satisfy the needs of out-of-state preference customers, 55 F.P.C. at 1121, there is no evidence that PASNY gave any consideration to allocating more than 180 MW of firm and peaking power to serve the needs of out-of-state preference customers. Nor is there any evidence that PASNY first compared the needs of New York State customers with the needs of out-of-state preference entities before allocating more preference power to New York State customers. By selling preference power to

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Moreover, we have no reason to doubt the reliability of this evidence. In *PASNY*, the Second Circuit agreed with the Commission that PASNY was supplying New York State preference customers substantially all of their reasonably foreseeable needs (547.2 MW), and would be able to continue to do so until June 30, 1985. 743 F.2d at 112. PASNY also asserted that it would be able to satisfy all the needs of MEUA members between 1985 and 1990 by supplying them up to 697.53 MW of power. *Id.* The court modified the remedy we ordered in Opinion No. 151 in order to permit PASNY to attempt to satisfy preference customers' needs without abrogating PASNY's contracts by substituting power from the St. Lawrence project. *Id.* at 112-13. Since 40 percent of the Niagara Project's firm power, as determined in *Vermont*, is 752 MW, the presiding judge correctly concluded here that PASNY is not using 40 percent of the Niagara Project's power to serve the needs of New York State preference customers.

non-preference entities in New York State while denying preference entities in neighboring states the maximum Congress set aside, PASNY acted unreasonably and in violation of the NRA.

When the NRA set 20 percent as the maximum amount of preference power to be made available for out-of-state customers, it linked this allocation to the general provision which set aside half of the project power for the needs of public bodies and nonprofit cooperatives. Section 1(b)(2) of the NRA, 16 U.S.C. § 836(b)(2), concludes by directing that "[t]he arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection." Those preferences concern the allocation of project power between "public bodies and nonprofit cooperatives within economic transmission distance," on the one hand, and "utility companies organized and administered for profit," on the other hand. PASNY cannot make a "reasonable" allocation for out-of-state preference customers according to a different standard than the one it uses to determine the "reasonably foreseeable needs" of New York State preference customers. Nor can PASNY make preference power available to non-preference customers while denying that power to preference customers. PASNY must operate under the same marketing plan within and outside New York.

III. THE ENTITLEMENT ISSUES

The NRA directs PASNY to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" in disposing of 50 percent of the Niagara Project's power. 16 U.S.C. § 836(b)(1). Although the statute "expresses a Congressional expectation," *PASNY*, 743 F.2d at 104, that preference power "shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers," 16 U.S.C. § 836(b)(1), the Second Circuit declared that this expectation was "not a mandate." 743 F.2d at 104. Rather, the court found Congress rejected an end-use preference and adopted instead a federal-type

preference which allows preference customers "the right to decide on the ultimate retail distribution of the preference power sold to them." *Id.* at 105. The court read the legislative history to be premised upon the principle of yardstick competition which assumes "that if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all, including rural and domestic consumers." *Id.*

As discussed above, a maximum of 10 percent of Niagara Project power is set aside for preference entities in neighboring states. In making this preference power available, the statute directs PASNY to negotiate with "the appropriate agencies in such States." 16 U.S.C. § 836(b)(2). However, "[i]n the event of disagreement between the licensee and the power-marketing agencies of any such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto." *Id.* The statute further requires PASNY to deal only with a state "bargaining agency" when the State designates "a bargaining agency for the procurement of such power on behalf of such State." *Id.* Finally, the subsection concludes that "[t]he arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection." *Id.*

In this section we will interpret the words Congress used in the NRA in order to determine which of the parties to this proceeding are entitled to purchase Niagara Project preference power. Since the NRA does not distinguish between "public bodies" in New York and in "neighboring States," we will construe the statute's entitlement criteria in a manner that is consistent with the Second Circuit's decision in *PASNY*.

A. "NEIGHBORING STATES"

At the outset, we reject Allegheny's asserted limitation on the term "neighboring States," and reaffirm our construction on this

term in *Vermont*. Contrary to Allegheny's assertion (Exceptions at 8-39), Congress did not specifically designate Ohio and Pennsylvania as the sole out-of-state recipients of preference power, as it might have done.[6] Without specific proof that the use of the literal meaning of "neighboring States" would lead to "absurd results" or would otherwise "thwart the obvious purpose of the statute," we must conclude that Congress meant what it said. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), quoting *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

Connecticut, Massachusetts and Vermont are neighboring states to New York because they border New York on the east. The legislative history makes clear that Congress considered Ohio to be a neighboring state. We find that the purposes of the NRA will be served by construing the term "neighboring States" in a manner that is consistent with its usual meaning. The NRA was developed as a compromise between two competing views, one which saw Niagara hydropower as a regional resource, and one which considered it a New York State resource. H. R. Rep. No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Ad. News 1585, 1593. The compromise limited out-of-state preference customers to 10 percent of the project's power. *Id.* By interpreting "neighboring States" according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis.

If Congress had intended to benefit only Ohio and Pennsylvania, it would not have stated that it expected the power to be made available "in such manner as to encourage the widest possible use." 16 U.S.C. § 836(b)(1). Rather, the numerous references to Ohio and Pennsylvania in the legislative history simply demonstrate that Congress had particular interest in these states, not that Congress intended to grant them an exclusive benefit.

6. In contrast, Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. § 617d(c), specifies a preference for the states of Arizona, California and Nevada.

Public bodies and non-profit cooperatives in Ohio and Pennsylvania were probably considered the ones most likely to benefit from the out-of-state allocations because of their proximity to Niagara Falls.

Moreover, the legislative history does not clearly demonstrate that a more limited reading of the statute is necessary. There are indications in the legislative history that Congress intended to benefit states other than Ohio and Pennsylvania. For example, Senator Chavez of New Mexico, who was Chairman of the Committee on Public Works (a subcommittee of which conducted the 1957 hearings), stated in the course of his remarks opening the debate on the compromise bill:

> The New York and New England area has the highest power rate of any section of the country. It is hoped that the Niagara project will provide a source of cheap, dependable power that will provide an adequate yardstick and permit lower power rates and greater use of electricity over a large part of the northeastern section of our country.

103 Cong. Rec. 14,438 (1957).

Congressman Miller of New York represented the congressional district within which the Niagara project would be constructed and, therefore, participated actively in the legislative proceedings. He said during the course of the debate on the compromise bill:

> It is provided that 50 percent of the power will not be subject to any federal preference .... The other 50 percent will be subject to the preference clause, and 10 percent of that, or 20 percent of the whole, will be available to New York or the neighboring States. Any neighboring State, *such as Massachusetts*, if it makes application before the Federal Power Commission, will receive its reasonable share of this power if it can prove that the power can be transmitted to such State and be sold there under economic conditions and that they can utilize the power, and that it is cheaper there than power which they themselves can generate by steam power. Then they would be entitled to a portion of this power.

103 Cong. Rec. 13,204 (1957). (Emphasis added).

Lastly, Senator Ives of New York, who co-sponsored the Javits bill, spoke during the debate on the compromise bill "of fairness to other States involved, *particularly* Ohio and Pennsylvania". 103 Cong. Rec. 14,439 (1957). (Emphasis added). If Senator Ives understood the compromise bill to limit the meaning of the term "neighboring States" to Ohio and Pennsylvania, as Allegheny contends, he would not have used the word "particularly."

Taking all these factors together, we conclude that "neighboring States" should be construed according to its usual meaning.

B. "PUBLIC BODIES"

The NRA requires PASNY to deal only with a state "bargaining agency," whenever a state has designated a bargaining agency to procure preference power for the "public bodies and nonprofit cooperatives" in that state. 16 U.S.C. § 836(b)(2). During the 1957 Hearings before a Subcommittee of the Committee on Public Works, Senator Carroll explained to a witness from the National Rural Electric Cooperative Association that he believed the states should negotiate with PASNY through accredited agencies on behalf of preference customers. Hearings at 339. Section 1(b)(2), 16 U.S.C. § 836(b)(2), refers to such state agencies alternatively as "appropriate agencies in such States," "power-marketing agencies of any of such States," and "bargaining" agencies. We find that these three phrases are synonyms which use the term "agency" to refer to an entity that performs a function on behalf of another; in this case, the procurement of such power on behalf of preference customers in that state.

It is not disputed that VDPS is the bargaining agency of the State of Vermont. The State of Massachusetts authorized its Department of Public Utilities (DPU) to be its bargaining agency, which then authorized MMWEC to be its agent to procure Niagara Project power from PASNY. (Exh. 198).[7] However, we find that Congress did not use the term "bargaining

7. We reject the allegations that MMWEC lacks standing in this case, because there has been no clear proof that DPU lacked authority to designate MMWEC as its agent. In the absence of clear evidence to the

agency" in Section 1(b)(2) as a synonym for the critical term in Section 1(b)(1), "public bodies."

Congress required PASNY to observe the statutory preferences for "public bodies and nonprofit cooperatives" in making arrangements for the sale of preference power "to or in such States." 16 U.S.C. § 836(B)(2). Bargaining agencies are not entitled to purchase preference power in their own right. They may only act as agents for principals who are entitled to purchase preference power. On the other hand, the NRA imposes no end-use restrictions upon resale of that power by public bodies and nonprofit cooperatives. *PASNY*, 743 F.2d at 104. The NRA limits whom PASNY may sell preference power, not how the power should ultimately be used.

Before we can allocate Niagara preference power, we must decide which of the applicants are "public bodies." (there is no dispute what the term nonprofit cooperative means.) Relying heavily upon our decision in *Vermont*, the presiding judge concluded that VDPS is a "public body." Initial Decision at 17-18. While the judge found no changed circumstances since our decision in *Vermont*, *id.*, we find that the court's decision in *PASNY* requires a reevaluation of this determination.

Contrary to Vermont's assertion, *stare decisis* does not bar this reevaluation. (*See* Opposition at 26-33). Nor are we precluded from reconsidering our prior decision because of collateral estoppel, as the Massachusetts Group asserts. (*See* Opposition at 23-26). First of all, "[t]here is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. [The Supreme] Court and other courts have approved such administrative (changes in course,) as long as the new interpretation is consistent with congressional intent." *Bankamerica Corp.* v. *United States*, ___ U.S. ___, 103 S. Ct. 2266, 2281 (1983) (White J., dissenting). (Footnote omitted).

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contrary, we will assume that this Department of the State of Massachusetts properly discharged its official duties. See Moore v. Ross, 502 F. Supp. 543, 554 (S.D.N.Y. 1980), aff'd, 687 F.2d 604 (2d Cir. 1982, cert. denied, 459 U.S. 1115 (1983).

The *Vermont* decision was case-specific, concerning an allocatino of 30 megawatts of power to Allegheny in 1974. While we approved the allocation to Allegheny, we ruled that PASNY must make a reasonable portion of preference power available out-of-state. In this case we are determining whether that has occurred. In *Vermont*, further, Allegheny admitted that PSB was a "public body,"[8] 55 F.P.C. at 1113, but argued that the "PSB's status as a public body serves merely to thwart the will of Congress." 55 F.P.C. at 1116. We disagreed because we found that the PSB was ensuring that the power would benefit domestic and rural customers in Vermont. *Id.* Now, *PASNY* has instructed us not to scrutinize end-use. Since the explicit rationale in *Vermont* was based on an erroneous construction of the NRA, it must not bind the future negotiations among these parties. In deciding these difficult legal questions, we must not allow preclusion notions to interfere with our obedience to a recent related precedent. These doctrines must not be applied woodenly and rigidly to defeat congressional intent. Finally, in *Vermont*, we specifically left for a future case the allocation issues presented here. 55 F.P.C. at 1120.

The critical error in the Initial Decision in this case, and in the *Vermont* decision upon which the judge relied, is the assumption that the NRA contains an end-use preference. In defining VDPS as a "public body," the judge put great weight upon the fact that VDPS was using this preference power to benefit domestic and rural consumers. Initial Decision at 21. Yet the Second Circuit has now ruled that the NRA contains no end-use preference. At the same time, the presiding judge recognized that defining VDPS as a "public body" under the NRA would subvert the goal of yardstick competition because VDPS would resell that power to both publicly-owned and privately-owned utilities. *Id.* at 20. Yet that was the very goal the court found lay beneath the preference for "public bodies." Under these circumstances we cannot defer to either decision, but must reevaluate the legislative history in light of *PASNY*.

8. The presiding judge noted that "Allegheny concedes that PSB is a public body of the State of Vermont." 55 F.P.C. at 1129.

In the beginning of this century, Congress did use end-use preferences. *See, e.g.*, the Reclamation Act of 1906, 43 U.S.C. § 552; the Raker Act, 38 Stat. 242 (1913), and the Salt River Project Act, 43 U.S.C. § 598 (1922). However, by 1928, Congress replaced the end-use preference with preferences for specified classes. *See* Boulder Canyon Project Act, 43 U.S.C. § 617d(c), which grants preference only to a "State". Beginning in 1933,[9] Congress began to justify this federal-type preference to particular classes on the basis of yardstick competition. In *PASNY*, the Second Circuit found that Congress rejected an end-use preference, and instead adopted a federal-type preference for 50 percent of the Niagara Project power. 743 F.2d at 105.

The term "public bodies" was first used in the context of federal preference policy in 1937 in the Bonneville Power Act, 16 U.S.C. § 832b, which defines the term as states, public power districts, counties and municipalities, including their agencies or subdivisions. Notwithstanding that broad definition, another provision, 16 U.S.C. § 832c(d), appears to limit the meaning of "public bodies" to *distributors* of electric energy (emphasis added):

> It is declared to be the policy of the Congress . . . to afford such *public bodies* or cooperatives reasonable time and opportunity . . . legally to become qualified purchasers and *distributors* of electric energy available under this chapter.

Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, is the only statute according preference in the sale of federal power that is mentioned in House Report No. 862, explaining the compromise bill that became the NRA. That provision states, simply, that "Preference in the sale of such power and energy shall be given to public bodies and cooperatives." In 1955, while some of

9. *See* the Tennessee Valley Authority Act, 16 U.S.C. § 831i (1933); the Rural Electrification Administration Act (loans, now power), 7 U.S.C. § 904 (1936); the Bonneville Power Act, 16 U.S.C. § 832b (1937); the Fort Peck Project Act, 16 U.S.C. § 833b (1938); the Flood Control Act of 1944, 16 U.S.C. § 825s; the Eklutna Project Act, 64 Stat. 382 (1950); the Falcon Dam Act. 68 Stat. 255 (1954); and the Atomic Energy Act Amendments of 1954, 42 U.S.C. § 2064.

the predecessor bills to the NRA were pending before Congress, the Attorney General interpreted Section 5[10] *in pari materia* with 16 U.S.C. § 832c(d) and spoke of preference customers as being *distributors* of power. Indeed, the purpose of the preference clause was understood in the years just prior to 1957 "to insure adequate supplies of power at the lowest possible cost to nonprofit and public and semipublic distributors."[11]

The Committee which reached the compromise that was enacted as the NRA used the terms "public bodies" and "public distribution systems" in two adjacent and related paragraphs which discuss the compromise between federal preference advocates and New York State interests. H. Rep. No. 862, *reprinted in* 1957 U.S. Code Cong. & Ad. News 1585, 1593. Indeed, the statute itself uses the terms "sale and distribution" in the precatory language. 16 U.S.C. § 836(b)(1). Under these circumstances, we conclude that only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA. *See PASNY,* 743 F.2d at 103, where the Second Circuit uses the term "municipal utilities" for public bodies.

VDPS cannot be a "public body" within the purview of the NRA because it does not own a retail distribution system. It acts as a wholesale broker of power to public bodies, nonprofit cooperatives, investor-owned utility companies and an industrial company. While VDPS can negotiate with PASNY as a "bargaining agency," it may only procure preference power on behalf of public bodies and nonprofit cooperatives in Vermont.

It is likewise improper to treat MTA as a public body. While VDPS is a power wholesaler (Tr. 2620), MTA is a power consumer. This difference is irrelevant under the NRA, however, because in both cases the sale of preference power to these applicants would defeat yardstick competition. While MTA contends

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10. 41 Op.A.G. 236, 243 (1955).

11. III Report of the Task Force on Water Resources and Power for the Commission on Organization of the Executive Branch of the Government, "The Preference Clause in Federal Electric Power Development and Distribution," 1107, 1110-11 (1955). (Footnote omitted).

that it is in fact a distributor of preference power "to its own operating subsidiaries" (Exceptions at 16), this argument ignores the fact that the precatory language of the NRA refers to distribution of preference power "to the people as consumers." 16 U.S.C. § 836(b)(1). MTA ignores the words "as consumers," as well as the phrase "to whom such power shall be made available." In context, the words "as consumers" means "as consumers of the power," and not as consumers of the goods or services that are produced by the consumption of the power by others. We also reject MTA's contention (Exceptions at 46) that the NRA contains a preference for power-users, such as "defense projects" and "government installations." The Clark and Javits bills both did propose a preference for "defense agencies of the United States." However, the compromise bill that became the NRA did not include this preference. As Senator Clark said, in the NRA the project power is "divided into two parts, one-half to go to private power interests, and the other half to be reserved under the normal Federal preference clause." 103 Cong. Rec. 14,439 (1957).

Nor is it determinative that municipal utilities may use some of their preference power for municipal purposes. (*See* MTA Exceptions at 50). Federal preference policy does not limit the uses to which preference power can be put by entities that are entitled to receive preference power. Thus, publicly-owned distributors and sellers of electricity can supply a municipality the power it requires to provide municipal services. By focusing on the recipient rather than the use, Congress hoped to instill competition into an otherwise monopolistic market. The allocation of preference power to MTA, which provides no competitive pressure in the market for electricity, would withdraw a significant amount of power from the competitive marketplace, thereby diminishing the role Niagara Project power can play in reducing electric rates through yardstick competition. We agree with the presiding judge that the legislative history demonstrates that MTA is not eligible to receive preference power. Initial Decision at 22.

In light of the fact that the precatory language of the NRA specifically mentions "sale and distribution," we conclude that Congress intended to confer a preference only upon publicly-owned distributors and sellers of electricity, who are capable of selling and distributing this power to the people as consumers of electricity. We therefore hold that (1) MTA may not be allocated any of the preference power from the Niagara Project, and (2) VDPS as a bargaining agency may be allocated preference power only to the extent it acts for public bodies and nonprofit cooperatives. Of course, the MTA may make purchases from the non-preference half of the project's output.

IV. The Allocation Methodology

Although the NRA directs PASNY to make a reasonable portion of Niagara Project power available to public bodies and nonprofit cooperatives in neighboring states, the statute recognizes that disagreements might arise between PASNY and the power-marketing agencies of those states. 16 U.S.C. § 836(b)(2). Consequently, the statute authorized this Commission to "determine and fix the applicable portion of power to be made available and the terms applicable thereto. . . ." *Id.* In this section we will set forth the principles which PASNY should apply in allocating 10 percent of the Niagara Project's power among the preference customers in the neighboring states who are entitled to receive preference power.

The presiding judge chose an apportionment methodology on the basis of the NRA, even though he found that "[t]he NRA prescribes no particular method of apportionment." Initial Decision at 24. Several of the parties contend that the allocation of preference power should be made according to a comparative benefits test. (*See e.g.*, Allegheny Exceptions at 75-83; Vermont Exceptions at 6-17). We agree with the presiding judge that it is the NRA, and not the Federal Power Act (FPA), that controls how preference power should be apportioned. Accordingly, we reverse our finding in *Vermont* that preference power should be

allocated on the basis of the public interest standard of the FPA, 16 U.S.C. § 803(a). 55 F.P.C. at 1137-38.

The 1957 Congressional Hearings on the Clark and Javits bills include in full our decision in *Power Authority of the State of New York*, 12 F.P.C. 172 (1953). Hearings at 96-112. In that decision, we stated that the FPA does not authorize this Commission to create on its own a preference for municipalities and cooperatives. Hearings at 99. Being aware of the Commission's disclaimer of authority to create a preference under the FPA, we believe that when Congress "expressly authorized and directed" the Commission in the NRA to issue a license to PASNY, and to include in the license specified conditions providing a power purchasing preference for "public bodies and nonprofit cooperatives within economic transmission distance," it intended the NRA to control our decisions on the implementation of these preferences.

The NRA provides no clear method of allocating preference power among preference customers and in no way indicates that a comparative benefits test is necessary. Indeed, all Congress said was that it expected the primary beneficiaries of preference power to be rural and domestic consumers. Although we disagree with the judge's finding that VDPS is itself a preference customer, we do not differ with his finding "that the most reasonable method of apportioning Niagara power among out-of-state preference customers is one which uses the number of residential customers (domestic and rural) served by each preference customer." Initial Decision at 29. While we have found the NRA to contain no end-use preference, we recognize that Congress did have an expectation that the preference power would be used "primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use." 16 U.S.C. § 836(b)(1). Thus, while we do not find that the statute compels our adoption of the allocation methodology chosen by the judge, on the basis of our discretion, we affirm the judge's conclusion that this method

is best because it "pays proper heed to the Congressional directives that the primary beneficiaries of Niagara preference power are to be rural and domestic users, and that the power is to be made available to preference customers in a manner which encourages the widest possible use." Initial Decision at 29.

When PASNY negotiates with state bargaining agencies, it should recognize that these bargaining agencies may procure preference power vicariously only on behalf of public bodies and nonprofit cooperatives that are entitled in their own right to receive preference power. Each preference entity should make available to PASNY the number of domestic and rural consumers served. Domestic and rural consumers served by preference customers that cannot receive the preference power, such as members that may be beyond economic transmission distance of the Niagara project, should not be counted. The power should then be allocated among the preference customers according to their percentage of the total number of domestic and rural customers who can be served by these preference entities. Once the power is sold to these preference customers, however, our regulatory function must end, because the NRA attaches no strings to the ultimate retail distribution of preference power sold to preference customers. *PASNY*, 743 F.2d at 104-05.

For the purpose of allocating preference power, the term "domestic" shall be defined as "residential," wherever located, and the term "rural" shall be construed to mean "farm," whatever the size. These definitions reflect the context of the phrase "domestic and rural consumers" in the NRA, immediately following the phrase "the people as consumers." *See* 16 U.S.C. § 836(b)(1). We therefore disagree with the construction of these terms in *Vermont*. 55 F.P.C. at 1116. Since we must here divide a precious resource that is in short supply among many preference customers, we have decided to allocate this commodity according to a more narrow reading of the congressional expectation.

The Initial Decision found, at 34, that CMEEC, MMWEC and Lansdale have "legal entitlements" to preference power, and

no party has claimed on exceptions that the municipal distribution systems for which CMEEC and MMWEC would procure the power, or that Lansdale's distribution system, are not within economic transmission distance of the Niagara project. But the Initial Decision at 35-37, refused allocations of firm and peaking power for those entities on the ground that firm transmission service was not available. In the case of CMEEC and MMWEC, there was a "bottleneck" in west-to-east transmission service within New York, and in the case of Lansdale there was a refusal within Pennsylvania to provide wheeling service for 1½ miles. We have been informed on brief, however, that there will be no west-to-east transmission "bottleneck" within New York subsequent to June 30, 1985, and that Lansdale is constructing its own 1½ mile transmission line. Consequently, as a practical matter, we do not need to review this determination of the judge because we have decided to limit the relief ordered to the period, beginning in July 1985, when PASNY begins to provide service under new contracts.

However, in order to guide PASNY in drafting these contracts, we will briefly state our views on why we are making the capability of receiving power an allocation criterion. While Congress did not make the capability of receiving the preference power an entitlement criterion, transmission service is necessary to permit enjoyment of the energy. Accordingly, we find that the availability of such service should be an allocation criterion in order to ensure that this valuable resource is used in an economical fashion. When the necessary transmission service within New York cannot be made available at the beginning of a contract period, the affected allocations (the power and associated energy) for preference customers in states neighboring New York should be reallocated temporarily among the other preference customers in neighboring states. Although PASNY is not responsible for arranging or providing transmission service outside New York, it should treat preference customers in neighboring states that encounter transmission problems outside New York the same as it treats such customers with transmission problems within New

York. Within a reasonable time to be fixed by PASNY, bargaining agencies and preference customers should be given an opportunity to propose a feasible plan for overcoming such problems. PASNY should reallocate temporarily the affected allocations of both the power and the associated energy among the other preference customers in neighboring states. However, once the plan is executed and the affected customers acquire the capability of receiving the energy, PASNY should ensure that these preference customers receive their allocation.

V. MISCELLANEOUS MATTERS

A. THE RELIEF

The Second Circuit's opinion in *PASNY* is our guide in fashioning relief. First of all, we must design a remedy that is "reasonably commensurate with the needs of the case." 743 F.2d at 112. Second, we must recognize that "[t]he purpose of the remedy is not to punish or confer a windfall on the complainant." *Id.* Finally, "the remedy cannot be fashioned in a vacuum; it must be designed with the injury in mind so that the least disruptive correction is ordered." *Id.* at 113.

Initially, MMWEC and CMEEC asked the Commission to fix 10 percent of the project power as the reasonable amount for use in states neighboring New York and, also, to allocate a fair share of that power for their respective states. Today, CMEEC asks the Commission (Exceptions at 49) to "fashion a prospective remedy that will make whole the Complainants wrongfully deprived of project power." MMWEC is more specific (Exceptions at 92-97), and asks for a "bank" of denied allocations that would be cashed by June 30,1985, or for an allocation to June 30, 1985, and an order that would prohibit PASNY from reducing the allocation prior to 1990,[12] stating

> MMWEC will again state its willingness to forego the benefits it should have enjoyed for the past four years, and

12. MMWEC notes that since there are more applicants for allocations of preference power subsequent to June 30, 1985, the allocations will likely be smaller. (Exceptions at 94 n. 1).

> should enjoy between now and whenever the Commission issues its decision, if it can at least be assured that, at the conclusion of this proceeding and after the issuance of that decision, MMWEC will obtain Niagara power for a reasonable period of time.

(Exceptions at 93-94). (Footnote omitted).

PASNY contends (Opposition at 76-78) that since the contracts at issue expire simultaneously on June 30, 1985, no relief should extend beyond that date. Joined by AMP-Ohio (Opposition at 13-17), PASNY also contends that, in any event, the Commission's authority to order relief if limited to determining and fixing the applicable portion of power "to be made available" in the future through June 30, 1985, when the present contracts expire. The Massachusetts Group adds (Opposition at 40-41) that MMWEC and CMEEC should be made whole from those who receive the power through June 30, 1985, but not from those who may receive the power after that date. Joining AMP-Ohio, Allegheny (Opposition at 74-79) and VDPS (Opposition at 35), assert that since they are not wrongdoers, it would be inequitable to take power from them after June 30, 1985, to compensate for what was done in the past. MMWEC also claims (Exceptions at 23-24) that CMEEC and MMWEC should have been allocated all of the interruptible power and energy, rather than proportionate shares, if they were properly denied their shares of firm power and energy. AMP-Ohio, on the other hand, insists upon its portion of each category of power and energy, stating (Opposition at 12) that it is not AMP-Ohio's fault that CMEEC and MMWEC do not have firm transmission service.

The Initial Decision, at 39, ordered PASNY, in effect, to reallocate among Allegheny, AMP-Ohio and VDPS for the balance of the contract period ending June 30, 1985, 10 per cent of the Niagara firm power (188 MW) and 3¾ percent of the Niagara peaking power (15 MW).[13] While we would modify those reallocations to conform to this opinion and order, such modifications

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13. The Initial Decision, at 40, also ordered PASNY to reallocate among Allegheny, AMP-Ohio, CMEEC, MMWEC and VDPS "10 percent of the nonfirm Niagara power," or 20,000 kW. In the light of the identification and quantification of categories of Niagara power and

would require, among other matters, the development of uniform figures for counting domestic and rural consumers in the manner specified in the preceding section. Considering the short time remaining in the contract period, we doubt that the parties can develop the figures sufficiently in advance of the end of the period to permit any meaningful relief through June 30, 1985. Consequently, we are vacating, rather than modifying, the relief ordered by the Initial Decision.

Since the issues herein will soon become moot for the contract period ending June 30, 1985, we have decided instead to make this decision binding in the future. Our focus in this declaratory opinion and order is to provide guidance and relief for the period subsequent to June 30, 1985. PASNY should make future allocations to preference customers according to the principles set forth herein. We have decided that preference customers in states neighboring New York, including Connecticut and Massachusetts, are entitled to 10 percent of every classification of Niagara power and energy sold, both presently and for the foreseeable future, and that they are receiving less than their entitlement.[14] Accordingly, we are requiring PASNY to increase the allocations to 10 percent, subsequent to June 30, 1985, when the contracts with Allegheny, AMP-Ohio, PSB (VDPS) and MTA expire. Since we have decided that PASNY may neither sell preference power to MTA, nor to VDPS for resale to industrial and investor-

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energy in *Vermont*, which were used herein, we assume that the Initial Decision was reallocating 20,000 kWh (or, probably, 20,000 MWh) of peaking interchange energy. However, we have not attempted to resolve any of the associated exceptions because, as discussed in this paragraph, we are not providing any relief for the contract period ending June 30, 1985.

14. The Compliance Report that PASNY filed for 1983 pursuant to Ordering Paragraph (G) of Opinion No. 151 confirms the earlier-dated figures in the record. In 1983, 7.7 percent of all classifications of Niagara power and 5.6 percent of all classifications of Niagara energy were sold for use in states neighboring New York. Those states were shortchanged 2.62 percent of the firm energy (316,762 MWh), 1.95 percent of the peaking energy (9,288 MWh) and 10.00 percent of the peaking interchange energy, excluding inter-project transfers (20,139 MWh). Official notice is taken of this filing.

owned utility companies, we are prohibiting PASNY from doing so after that date.

On the other hand, we decline to grant any relief to compensate in future contract periods for the lack of allocations in the contract period ending June 30, 1985, or to allocate one classification of preference power and/or energy to compensate for the lack of an allocation of a different classification. In both cases, there is merit to the argument that some sort of recompense would be appropriate. However, since the supply of preference power and/or energy is finite, any recompense would be at the expense of other customers. We find that it would be unduly punitive to reduce the allocations of customers which were not at fault. Considering that neither those who received too much nor those who received too little (or none) were at fault, we have concluded that the least disruptive correction would be the one that requires the preference power and energy to be reallocated in the manner contemplated by this opinion and order for the period after June 30, 1985. *See PASNY,* 743 F.2d at 113.

Finally, we have concluded that it is now time to bring Ordering Paragraph (B) of the *Vermont* decision, and Ordering Paragraph (G) of the order issued November 2, 1979, in the *MEUA* proceeding, up to date, and to require PASNY subsequent to June 30, 1985, to make available for use in neighboring states 10 percent of every classification of Niagara power and energy sold. As the power and energy are now classified, that includes 10 percent of the firm power and associated energy sold, 10 percent of the firm (paragraph A) peaking power and associated energy sold, 10 percent of the paragraph B peaking power and associated energy sold, and 10 percent of the peaking interchange energy sold—but excludes the peaking interchange energy that is used to support firm energy obligations on PASNY's system only and, consequently, is not sold. (*See* PASNY Opposition at 66-69).

B. The Late Intervention

On April 29, 1983, the New York Industrials filed a petition to intervene late, stating that they were a party to the *MEUA* proceeding involving preference power for New York; that they did not know until the issuance of Opinion No. 151-A on April 6, 1983, that the "public bodies" issue was pending in this proceeding involving preference power for neighboring states; and that, as purchasers of expansion power, they have a substantial interest in the decision of that issue that is not adequately represented by any party to this proceeding. MEUA filed an opposition on May 13, 1983, appending evidence that the New York Industrials knew at least as early as December 1982 that the "public bodies" issue was pending herein, and that parties to this proceeding may be prejudiced by their inability to respond to the New York Industrials' arguments on brief. While we have serious doubts that the New York Industrials have made an adequate showing to be permitted to intervene late, we will permit their intervention in this instance because of their participation in the *MEUA* proceeding, and our decision in Opinion No. 151-A to reconsider the "public bodies" issue in this case.

C. The Post-Briefing Filings

On August 15, 1984, the United States Court of Appeals for the Second Circuit decided the appeal of the Commission's *MEUA* decision is *PASNY*. On August 21, 1984, MMWEC filed a motion to lodge with the Commission a copy of the Second Circuit's decision in typewritten form, commenting briefly on the relevance of the decision to the issues herein. In response, the parties attempted to argue about the significance of the *PASNY* opinion in relation to the issues in this case. Rule 711 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.711, authorizes participants to file a brief on exceptions and a brief opposing exceptions within certain time limits, and then provides, "No additional briefs are permitted, unless specifically ordered by the Commission." Although the foregoing filings purport to be motions and answers, we are treating them as

unauthorized briefs on the merits, and, consequently, we have not considered any of them, on their attachments, with the sole exception of the Second Circuit's decision, in connection with our decisions on the merits of the issues in this case.

THE COMMISSION FINDS AND DECLARES:

(1) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, pertaining to preference power for states neighboring New York, should be reaffirmed and adopted insofar as it determines that the term "neighboring States" is not limited to Ohio and Pennsylvania, and, consequently, allows the sale of preference power for use in Connecticut, Massachusetts and Vermont, among other states.

(2) The MTA is not a "public body" under the NRA. Congress intended to limit the meaning of the term "public bodies" in Section 1(b)(1) of the NRA, 16 U.S.C. § 836(b)(1), to publicly-owned sellers and distributors of electricity at retail.

(3) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, should be overruled insofar as it determines (A) that VDPS is a "public body" within the purview of the NRA, and (B) that the NRA "does not preclude distribution of Niagara power through investor-owned utilities to those intended to be benefitted."

(4) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, should be overruled insofar as it decides who is entitled to purchase preference power, and how the power is apportioned, on the basis of subjective judgments under the "public interest" standard of the FPA. The entitlement criteria of the NRA are controlling and the Commission has discretion to fashion an allocation methodology consistent with the principles of the NRA.

(5) Any public body or nonprofit cooperative in a state neighboring New York within economic transmission distance of the Niagara project is entitled under the NRA to an allocation of preference power.

(6) Subject to the four-to-one statutory division of preference power between New York and its neighboring states, preference

power without discrimination. Preference power should be apportioned among preference customers within neighboring states, in accordance with the number of domestic and rural consumers of the preference entities. However, PASNY is not required to provide power or the energy associated with that power to a preference customer in a neighboring state, when the necessary transmission service is not available at the beginning of a contract period. Until such service becomes available, PASNY may reallocate that power temporarily among other out-of-state preference customers.

THE COMMISSION ORDERS:

(A) The Initial Decision issued March 9, 1983, is affirmed as modified herein, but the relief ordered therein is vacated.

(B) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, is reaffirmed and adopted insofar as is specified in Finding and Declaration Paragraph (1), and is overruled insofar as is specified in Finding and Declaration Paragraphs (3) and (4).

(C) Subsequent to June 30, 1985, PASNY may only sell preference power to publicly-owned sellers and distributors of electricity at retail, to nonprofit cooperatives, or to bargaining agencies in neighboring states acting on the behalf of such preference entities.

(D) Subsequent to June 30, 1985, PASNY may only sell MTA non-preference power.

(E) PASNY may not refuse to allocate preference power to public bodies or nonprofit cooperatives subsequent to June 30, 1985, on any grounds other than their failure to comply with the requirements of this opinion; but PASNY may reallocate the power temporarily pending the commencement of the necessary transmission service.

(F) Subsequent to June 30, 1985, PASNY shall make available to preference customers in states neighboring New York 10 percent of every classification of Niagara power and energy sold.

(G) Bethlehem Steel Corporation, General Motors Corporation, Occidential Chemical Corporation-HOOKER Industrial &

Specialty Chemicals, Olin Corporation and Union Carbide Corporation are permitted to intervene herein pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.214; *provided,* that their participation as intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their collective petition to intervene; and, *provided further,* that their admission as intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding; and, *provided further,* as set forth in Rule 214(d)(3)(ii), that they accept the record of this proceeding as it was developed prior to the late intervention.

(H) All exceptions not granted are denied.

By the Commission. Commissioner Stalon dissented with a separate statement to be issued later.

(SEAL)

/s/ KENNETH F. PLUMB,
Secretary.

STALON, COMMISSIONER, *dissenting:*

A good decision by a regulatory body should not encourage uneconomic activity on the part of economic decision units in the society. By inviting continuing disputes over the Niagara Project's low cost power for years to come, this decision fails this test.

The Niagara Project's value to the preference customers is immense. Collectively, these customers save several hundred million dollars annually by buying preference power instead of having to generate or purchase power at current cost. It is in every customer's individual interest to vigorously litigate the case to capture economic rents of this magnitude. As changes occur in transmission technology and in the number and size of cooperatives and public bodies, the allocation of the project's benefits will have to change as well. At every stage, the litigants have the incentive to spend tremendous sums on money on lawyers and consultants to get a larger share of the Niagara pie.

The logical outcome of the sequence of decisions that this order puts in place and legitimizes is to slowly exhaust the economic rents that are inherent in the neighboring states' share of Niagara power. Clearly these parties, by force of circumstance, will be required to engage in an expenditure of real economic resources up to the amount of rent they expect to receive. As transmission facilites improve and a larger number of "public bodies" become eligible, these new bodies will be compelled to engage in this squabble for rents. The consequence will be a squabble that will continue until all economic rents are used up in legal fees and/or in other uneconomic expenditures by the parties to capture the Niagara Project's benefits—or until the Commission ends the litigation.

I believe that we can eliminate much of this dispute by adopting an alternative procedure. I appreciate others' view that, while my recommendations have merit, they are not workable within the constraints imposed by the law and the record in this case. But I believe that my recommendations are legally sound, are supported by the record, and should be implemented. The

basic elements of my alternative procedure, including the legal and policy arguments in favor of it, are as follows:

1. Allocation Methodology

The purpose of the Niagara Act's allocation to out-of-state entities was to ensure that the project's benefits were not absorbed exclusively by New York customers. Thus, the statute directs that customers in neighboring states be given a share of the project's power—but does specify how to allocate the neighboring states' respective shares. A natural and simple way to divide the power among the neighboring states is on the basis of their populations. If two neighboring states are equal in population, it is logical that they should receive an equal amount of power (assuming their preference customers can use the power). While other methods are also reasonable (e.g., giving the states different amounts of power based on their different numbers of domestic and rural customers), using population would eliminate disputes about the data base used in making the allocations.

While this would not further implement the precatory language in Section 1(b) about domestic and rural consumers, it is not necessary for the allocation method to do so. Congress' method of insuring that the people as consumers, particularly domestic and rural consumers, were the primary beneficiaries of the preference power, was to choose public bodies and non-profit cooperatives as the sole preference power recipients. Congress then imposed no end-use restrictions on the preference bodies.

Indeed, using population as the allocation method avoids the anomoly of allocating power to "neighboring states" on the basis of end-use when end-use may not be taken into account in determining whether an entity is entitled to be allocated power. While on the one hand, using an end-use test in allocating power furthers the purposes underlying the precatory language (the same argument made by PASNY in favor of an end-use test in furnishing the power), on the other it imposes an end-run around the Second Circuit's rejection of an end-use test. A pure population

test is legally sound and eliminates squabbles among the parties over usage and customer numbers.

The statute does not require that the neighboring states get 10% of the power–only that their required share may not exceed 10%. The statute gives no guidance on how much power to give to the out-of-state entities in the event in-state needs exceed 40% (an event that should happen soon). Given the relative actual and potential demands of out-of-state and in-state preference bodies, we should clarify that out-of-state entities should receive a full 10% share in the future.

2. Public Bodies

The Niagara Act does not define the term "public body." The order states that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies," and concludes that the Vermont Department of Public Service (VDPS) is not a public body (since it does not sell electricity at retail). I do not believe that this conclusion is compelled by the statute; to the contrary, the plain meaning of the term "public body" is simply any government body. *See* Ballentine's Law Dictionary 1020 (1969). The statute does contemplate that the power be made available for the people as consumers, but it fails to distinguish between public entities that sell at retail and those (such as VDPS) that do not distribute the power themselves. And furthering "yardstick competition," while a purpose of the preference provisions (regretably so, since an entity's ability to price electricity cheaply because of access to a cheap power source provides no meaningful yardstick against which to measure the performance of an entity that has no access to the cheap power source), does not dictate such a differentiation. By spreading the project's benefits to investor-owned (rather than publicly-owned) utilities whose rates must be just and reasonable, "yardstick competition" against utilities without such power would still exist (although I do not advocate my approach on this ground). In short, the plain meaning of the statute should prevail.

My conclusion that VDPS is a public body is not in conflict with the Second Circuit's ruling that the Niagara Act contains no end-use preference. *Power Authority of the State of New York* v. *FERC*, 743 F.2d 93, 104 (2d Cir. 1984). The order is correct in concluding that the Presiding Judge's decision (22 FERC ¶ 63,087 (1983)) and the Commission's *Vermont Public Service Board* v. *Power Authority of the State of New York (Vermont)* decision (55 F.P.C. 1109 (1976)) on this issue are undermined by the Second Circuit's ruling, because those orders' conclusion that VDPS was a public body was based in part on the fact that VDPS would ultimately distribute the power to domestic and rural consumers. Finding VDPS to be a public body, it was concluded, furthered the presumed end-use preference for these customers. My conclusion about VDPS, on the other hand, does not presume that there is an end-use preference; to the contrary, once a public body receives the power, it may sell it to anyone. And I do not believe that the plain language of the statute requires an entity to sell the power at retail to qualify as a public body.

Finding VDPS to be a public body is also preferable from a policy perspective. A significant problem with the proposed order is that it encourages the construction of uneconomic transmission facilities. Landsdale in fact is now building a 1.5 mile transmission line, solely to get its share of the economic rents from the Niagara Project. The Commission should do everything it can to discourage this kind of uneconomic investment. Declaring VDPS a public body should substantially reduce the incentive for preference entities to engage in this kind of investment, because it would encourage other states to follow Vermont's lead to spread the project's benefits around. According to MMWEC, several states already plan on doing this if we affirm *Vermont* and the judge in this respect. We should so affirm, as it would minimize the damage to economic efficiency that the majority's interpretation of this statute causes. It would also serve the statutory goal of making the project's benefits available as widely as possible.

3. Reasonable Economic Transmission Distance

Under the statute, the burden falls upon PASNY to determine whether an entity is in "reasonable economic transmission distance." Thus, the ultimate responsibility for making this decision rests with the Commission, as the various parties challenge each other's qualification under this standard. I expect the arguments here to be particularly lengthly, as each party brings in its experts to prove that it is in economic transmission distance and that the others are not. Unlike its treatment of the allocation methodology question, however, the order gives little guidance on what "reasonable economic transmission distance" means. I think we should do so.

The basic purpose behind the economic transmission distance requirement was to ensure that the difference between the cost of Niagara power and a preference body's generated (or purchased) power–i.e., the gross savings–exceeded the cost of transmission. I believe this is what reasonable economic transmission distance means. The problem arises when the element of time is introduced into the calculation. While the cost of firm Niagara power is presumably static, a preference body's generating cost will vary significantly over time. In addition, the cost of transmission varies tremendously between peak and off-peak loads on the system. Unless we rule on this question now, we can expect the parties to the next complaint proceeding to introduce evidence on their and others' presence within economic transmission distance at various points in time. This would be a costly and largely fruitless effort.

The Presiding Judge implied that all customers in Vermont, Connecticut, Massachusetts, Ohio and Pennsylvania are within economic transmission distance. 22 FERC at 65,284. In his 1975 decision in the *Vermont* case, Judge Levant appeared to use average annual transmission costs to determine reasonable economic transmission distance. 55 F.P.C. at 1132-35. I think the judges were on the right track.

We could fairly conclude, given the low cost of Niagara power, the much higher average cost of power throughout the Northeast,

and the average annual cost of transmitting power in the area, that all customers in neighboring states are within reasonable economic transmission distance of the Niagara Project. I would hesitate to do so in this order only because of the lack of record evidence on this question. But we should lay out the guidelines for determining reasonable economic transmission distance.

The most important guideline to be established is that average (preferably average annual) generation and transmission costs should be used to determine whether an entity is within reasonable economic transmission distance. We should also establish that, for entities connected to the transmission grid, average statewide transmission costs should be used for the determination. These methods of determining reasonable economic transmission distance are consistent with the statute; there is nothing in the statute or legislative history to suggest that finer methods should be used. By establishing these reasonable guidelines, we should be able to eliminate a great deal of the litigation over who qualifies as within reasonable economic transmission distance. It is readily apparent that virtually everyone in the Northeast would meet this test.

4. Length of PASNY's Contracts

One of the most serious problems that the order leaves open is whether PASNY can enter into long-term contracts with its preference customers. Unless it is able to, any allocation it devises, even if fully consistent with the proposed order, is going to be subject to repeated challenges as preference bodies change in size and number. The problem will get even more complicated in 1990 after the in-state investor-owned utility contracts expire, and New York's preference customers' needs exceed 40% of the Niagara project's power–opening the question of whether the out-of-state customers' share should drop below 10% (unless the procedure I recommend above on this question is adopted). Without long-term contracts, PASNY's allocation plan will be the subject of endless litigation at the FERC.

I do not believe the statute requires PASNY or the Commission to continually fine-tune its allocation. While it would be contrary to the statute to allocate the power for an unreasonable length of time, it would be proper for the Commission to invite all parties interested in the power to appear before the Commission in an allocation proceeding and to fix the allocation for a reasonable length of time (e.g., ten years).

The proposed order gives PASNY no guidance on whether it can set long-term contracts. We should expressly approve (indeed, encourage) such a procedure as a fair balancing between the changing needs of preference customers and all parties' mutual interest in not relitigating the allocation on a continual basis.

These are the basic elements of my proposal. There are other ways in which I would take a different approach from the order; e.g., the Commission should, based on the language of Section 1(b)(2) of the Niagara Act, require preference customers, in an allocation proceeding, to be represented by power marketing agencies, and leave the allocation within a neighboring state to the state bargaining agency. And, these recommendations could be adopted singly, rather than as a group; to the extent they are accepted, they would reduce litigation and improve the result in this case. But I cannot concur in an order that, while within the confines of the law, will produce excessive, lengthly, and unseemly fights for this resource. There is another approach available, outlined here, that meets the law's requirements yet substantially reduces litigation. I advocate its adoption.

/s/ CHARLES G. STALON
Commissioner

Initial Decision, issued March 9, 1983

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL80-19-000

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL80-24

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

(March 9, 1983)

APPEARANCES

David R. Straus, Scott Strauss, Thomas C. Trauger and *Maurice J. Ferriter* for Massachusetts Municipal Wholesale Electric Company

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Edward R. Muller, Lowell D. Turnbull and *Edward Berlin* for New York State Electric & Gas Company

J. Cathy Lichtenberg, Mark S. Laufman, John Wyeth Griggs and *Wallace L. Duncan* for Municipal Electric Utilities Association of New York State

William C. Wise, Robert Weinberg and *William E. Mowatt* for Allegheny Electric Cooperative, Inc.

Reuben Goldberg, Channing D. Strother, Jr., June W. Wiener, Craig A. Glazer and *Thomas E. Wagner* for City of Cleveland, Ohio and American Municipal Power—Ohio

William I. Harkaway, G. Douglas Essy and *Gerald R. Tarrant* for The Vermont Department of Public Service and Vermont Public Service Board

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Donald F. McCarthy for Consolidated Edison Company of New York, Inc.

Woodrow D. Wollesen for Borough of Lansdale, Pennsylvania

Carmen Gentile and *Jay Hickey* for Boston Edison Company, Cambridge Electric Company, Commonwealth Electric Company, Eastern Edison Company, Fitchberg Gas and Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company

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LEWNES, PRESIDING ADMINISTRATIVE LAW JUDGE:

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HISTORICAL BACKGROUND OF THE NIAGARA PROJECT

This proceeding relates to the allocation of power generated by the Niagara Project No. 2216 to out-of-state entities under the terms of the Niagara Redevelopment Act (NRA).[1]

The NRA, enacted by Congress on August 21, 1953, empowered the Power Authority of the State of New York (PASNY) to construct and operate the Niagara power plant to utilize the portion of the waters of the Niagara River allotted to the United States by treaty with Canada.[2] As directed by the NRA, the Federal Power Commission (FPC) in 1958 issued a license to PASNY,[3] and the plant began commercial operation in 1961.

The proposed enactment of the NRA had been surrounded by a cloud of controversy relating to the extent to which a federal-type preference policy should apply to the project, and the amount of power to be allocated to preference customers in neighboring states. The enacted NRA stated (16 USC § 836(b)):

> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this article is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to

1. 16 USC § 836
2. Treaty Concerning Uses of the Waters of the Niagara River dated February 7, 1950 (TIAS 2130).
3. *Power Authority of the State of New York*, Project No. 2216, 19 FPC 186.

meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portions of power to be made available and the terms applicable thereto: *Provided*, that if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

The license issued to PASNY incorporated these marketing conditions *verbatim*.

In 1960, PASNY began negotiating the sale of the power to be produced by the plant, selling 445 MW to Niagara Mohawk Corporation as replacement power for generating capacity lost in the destruction by rock slide of its Schoellkopf Hydroelectric Plant in 1956. PASNY contracted to sell 81.6 MW to New York municipals and rural electric cooperatives, and 250 MW to investor-owned utilities under 30-year contracts on a withdrawable basis. (Exh. 52) In addition to the withdrawable power, PASNY contracted to sell to in-state investor-owned utilities 600 MW of firm power and 200 MW of peaking power. No states requested an allocation, and PASNY contracted to sell

180 MW of power intended for eventual allocation out-of-state to investor-owned utilities in New York State on a withdrawable basis.[4]

On October 31, 1960, the Public Service Commission of Vermont (Vermont) became the first out-of-state entity to apply for a share of Niagara power. Vermont asked to reserve for its own growing needs the 180 MW of power reserved to out-of-state entities. PASNY rejected that request, and agreed instead to sell 50,000 KW of firm power to Vermont beginning January 1, 1962.

In 1966, PASNY agreed to sell 100 MW of firm power to Allegheny Electric Cooperative, Inc. (Allegheny). Thus, at that time, 150,000 KW had been committed to out-of-state entities. PASNY reserved the remaining 30 MW of power earmarked for marketing to out-of-state entities for possible sale to customers in the State of Ohio. Due to Ohio's inability to resolve wheeling difficulties, however, PASNY, after accepting applications from Vermont and Allegheny and holding evidentiary hearings thereon, awarded the 30 MW of power to Allegheny in 1974. (Exh. 98, p. 6)

In response to the allocation to Allegheny, Vermont filed a complaint with the FPC where it asserted that PASNY should have allocated more power overall out-of-state and the additional 30 MW should have been awarded to Vermont. In an initial decision issued May 15, 1975 and affirmed by the FPC on March 12, 1976, styled *State of Vermont Public Service Board* v. *Power Authority of the State of New York*, 55 FPC 1109, the FPC, *inter alia*, approved the allocation to Allegheny, but ruled that PASNY must make a reasonable portion (up to 10 percent of all types of project power) available out-of-state. The 30 MW of additional firm power awarded to Allegheny was subject to an agreement between Allegheny and American Municipal Power-Ohio (AMP-Ohio) that Allegheny would relinquish to Amp-

4. As noted in Opinion No. 151, *infra* (*mimeo.*, p. 13, n. 14), PASNY had not at the time of its initial allocation determined how much power to allocate to out-of-state preference customers. This 180 MW reserved for out-of-state allocation represented approximately 10 percent of the firm generating capacity of the project.

Ohio all but 7,216 KW of that allocation when AMP-Ohio was able to negotiate the necessary transmission and wheeling arrangements. (55 FPC at 1112)

By 1976, Vermont, Allegheny, and Massachusetts Municipal Wholesale Electric Cooperative (MMWEC) expressed interest in continuing or commencing receipt of Niagara power. PASNY issued data questionnaires and applications to these parties, and further invited the governors of Connecticut, New Jersey, Ohio, and Massachusetts to apply for an allocation of power. PASNY ultimately received applications from Vermont, Allegheny, MMWEC, AMP-Ohio, Connecticut Municipal Electric Energy Cooperative (CMEEC), and the Borough of Lansdale, Pennsylvania (Lansdale).

After receiving responses to questionnaires and supplementary data, on August 11, 1977, the PASNY staff and management held an informal conference with the applicants. Subsequently, the staff negotiated contracts providing for receipt by Vermont of 10 MW of peaking power and 40 MW of firm power and by Allegheny of 110 MW of firm power and 20 MW of peaking power. The staff submitted a "Memorandum to the General Manager from the Director of Power Operations" dated September 16, 1977 which set forth the history of out-of-state power allocations and an analysis of the various applications. The staff recommended approval of an allocation consistent with the contracts negotiated with Vermont and Allegheny.

On September 21, 1977, the PASNY Trustees, in reliance on its staff recommendation, decided to advertise the contracts for a public hearing. At that hearing held on October 25, 1977, representatives of Allegheny, Vermont, and AMP-Ohio supported the proposed contracts, and Lansdale, CMEEC, and MMWEC opposed them. On November 22, 1977, the Trustees issued a formal decision approving the proposed contracts.

On December 6, 1977, PASNY submitted the decision, the hearing record, and the recommendation to the Governor of New York. The Governor disapproved the contracts and directed

PASNY to reconsider the question of what constitutes a reasonable amount of out-of-state power. It was made clear that the disapproval of the contracts resulted from Pennsylvania's newly-enacted gross receipts tax on electricity which fell on New York utilities.

After agreeing on February 9, 1978, to continue to provide power to Allegheny despite the imminent expiration of its contract, PASNY held another public hearing on April 26, 1978, on the queston of how much power should be sold out-of-state. The same groups appeared at that hearing. All of the out-of-state applicants requested that at least 20 percent of the 50 percent preference power be sold out-of-state while the New York State Energy Office suggested reduction of the existing out-of-state power allocation.

A memorandum dated June 13, 1978, from the general manager to the PASNY Chairman summarized various considerations related to questions of how much, to whom, and at what rate power should be sold out-of-state. PASNY advertised and held hearings on proposed contracts with Vermont, AMP-Ohio, and Allegheny, a process that spanned the period from June 1979 until December 1979. The Trustees approved the proposed contracts following the hearing. These newly modified contracts reflected the substitution of a portion of firm power with peaking power. Vermont was to receive 40 MW of firm and 10 MW of peaking power. Allegheny was to receive 105 MW of firm and 25 MW of peaking power until AMP-Ohio completed wheeling arrangements to accommodate 19 MW of firm power and 4 MW of peaking power. At that time, Allegheny would be reduced to 86 MW of firm power and 21 MW of peaking power. This in fact occurred on June 1, 1980. (Exh. 98)

All three contracts were approved by the Governor on January 11, 1980, and by their terms, expire on June 30, 1985. Since the time the contracts were entered into, energy removed from the out-of-state allocation has been provided to the Metropolitan Transportation Authority of the State of New York (MTA), which provides mass transit services to the people in the New

York City metropolitan area. PASNY allocated this energy to the MTA in purported furtherance of state energy policy mandates to encourage the use of mass transit facilities to conserve energy.

On October 22, 1980, Judge Birchman issued his initial decision in *Municipal Electric Utilities Association of the State of New York* v. *Power Authority of the State of New York*, Docket No. EL78-24 (Phase 1). The complainants in that proceeding challenged PASNY's allocation of power to in-state preference customers in 1960 and 1961. The complainants asserted that PASNY has failed to develop an estimate of the preference customers' reasonably foreseeable needs, and had not sold power sufficient to meet those needs to non-preference customers on a withdrawable basis, in contravention of PASNY's duties under the NRA. Judge Birchman held thusly (I.D., *mimeo.*, p.3):

> This initial decision finds and concludes that complainants have established that PASNY's compliance with P.L. 85-159 and the project license is unclear, and that PASNY has not shown that it provided for the reasonably foreseeable needs of preference customers at a time when it entered into contracts with non-preference customers and over the lives of those contracts.

He further determined that the contracts that resulted from PASNY's failure to comply with the requirements of the NRA were void, and he ordered them to be reformed to comply with the in-state preference provision. (*Mimeo.*, p. 62) To that end, he ordered the execution of new contracts with non-preference customers, to expire in 1985, preceded by an inquiry into the reasonably foreseeable needs of the preference customers. (*Id.*) He stated that, to provide relief for preference customers, PASNY must allocate an amount of all types of project power to those customers to meet their reasonably foreseeable needs, including the needs of their commercial and industrial customers. Judge Birchman defined preference customers as "distributing agencies of project power such as in-state municipal systems and non-profit

cooperatives, and . . . not . . . the Metropolitan Transit Authority." (*Mimeo.*, p. 3)

On October 13, 1982, the Commission reviewed Judge Birchman's decision in Opinion No. 151, its "Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference." Following an exhaustive review of the history of the NRA and the Niagara Project, the Commission affirmed Judge Birchman in substantial part. The Commission determined that its role in that complaint proceeding was to decide (*mimeo.*, p. 45):

> not the policy issue of whether it is factually or politically wise to allocate Niagara hydropower preferentially to public bodies and nonprofit cooperatives, but the mixed question of law and fact of whether PASNY's 1960 segregation of 325 MW of preference power underlying its 1961 sale of the power, and any related arrangements for the withdrawal of preference power, were sufficient "to meet the reasonably foreseeable needs of the preference customers."

This role, the Commission stated, as created by the interplay of the NRA and the Federal Power Act (FPA), involved interpretation and enforcement of the terms of PASNY's license to operate the Niagara Project, and extended to "declaring any nonconforming contractual provisions . . . void and unenforceable, and . . . requiring the substitution of other provisions that will conform to . . . the license." (*Mimeo.*, p. 46)

Opinion No. 151 described the statutory scheme created by Congress in the NRA as follows (*Mimeo.*, pp. 46-49):

> Congress devised a flexible marketing plan consisting of a statement of policy to guide PASNY in the administration of the plan through the years, and certain vehicles to implement the policy. The statement of policy is embodied in Subsection 1(b)(1) of the NRA and Article 20 of PASNY's license,
>
> > to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, to

> whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use. . . .

Congress said therein that *the people, as consumers of electric power,* and particularly domestic and rural consumers, are to be the primary beneficiaries of at least one-half of the hydropower developed at Niagara Falls. . . .

Congress selected two vehicles for implementing the statement of policy. First, in Subsection 1(b)(1), Congress designated exactly 50 percent of the project power as preference power and directed PASNY, in disposing of that power, to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" of the Niagara Project. . . . [S]uch an abundant supply of preference power would enable the public bodies and nonprofit cooperatives to engage in "yardstick competition" with utility companies organized and administered for profit. Their presence, and the availability of preference power for public bodies and nonprofit cooperatives that might be organized, would likely have a moderating influence on the electric power rates of profit-oriented utilities.

Congress knew, however, that a substantial part of the preference power would not then be resold by the public bodies and nonprofit cooperatives to domestic and rural consumers. . . . As a result, Congress selected a second vehicle for implementing the statement of policy by directing PASNY in Subsection 1(b)(5) to provide for resale rates for all of the hydropower (preference and non-preference power alike) that would be consistent with the statement of policy in Subsection 1(b)(1).

* * *

To the extent that the 50 percent of project power designated as preference power is not resold to domestic and rural consumers, part of the 50 percent of project power designated as non-preference power must be resold to domestic and rural consumers, and vice versa, to the end that the total amount of preference and non-preference power that is resold to domestic and rural consumers will be *at least 50 per cent of the project power.* [Emphasis in original]

The Commission further determined in Opinion No. 151 that Congress intended the term "public bodies" in the NRA to include only "those governmental entities that resell and distribute the preference power to the people as consumers of such power." (*Mimeo.*, p. 52) Further, the Commission reviewed and revised PASNY's list of "preference customers", for which customers' reasonably foreseeable needs PASNY should have reserved preference power. (*Mimeo.*, pp. 54-61) The Commission also determined that, to create the yardstick competition which Congress intended in the preference provision, PASNY was required to serve the industrial and commercial, as well as rural and domestic, loads of its preference customers. (*Mimeo.*, pp. 61-64) The Commission found that PASNY failed to make sufficient "flexible arrangements" (*mimeo.*, pp. 65-66) to meet the "reasonably foreseeable needs" (*mimeo.*, 66-76) of its preference customers.

Lastly, the Commission determined that, because PASNY failed to market power sufficient to meet the reasonably foreseeable needs of its preference customers on a withdrawable basis, "the resulting shortfall can be remedied by holding PASNY to its alternative obligation to provide for withdrawal of all of the preference power." (*Mimeo.*, p. 77) The Commission held as void PASNY's contracts with non-preference entities to the extent that the contracts limited the withdrawal of preference power to less than 50 per cent of the project power. (*Id.*) The Commission determined to leave to PASNY the responsibility to negotiate reformations of the contracts to conform to the Commission's decision, subject to the Commission's further review.

By order issued November 30, 1982, the Commission granted rehearing for purposes of further consideration and issued a temporary stay of Opinion No. 151.[5]

5. The Commission's order staying Opinion No. 151 effectively precludes the Presiding Judge from disposing of the motion filed by MMWEC and CMEEC jointly on October 20, 1982, for severance of the discrete "MTA" issue and for appropriate relief.

PROCEDURAL BACKGROUND OF THE INSTANT PROCEEDING

On March 4, 1980, MMWEC filed a complaint and motion for partial summary judgment requesting that this Commission, pursuant to its authority under the NRA and the license issued to PASNY, modify the 1980 out-of-state allocations of Niagara Project power made by PASNY. MMWEC alleged that it should have received an allocation of Niagara power, and that all out-of-state allocations of Niagara Project power should total at least ten percent of the project's capability. On March 27, 1980, an identical complaint was filed by CMEEC. By notice dated September 10, 1980, the Commission consolidated the proceedings.[6]

In its order on the complaints issued February 13, 1981, (February Order) (14 FERC ¶ 61, 128), the Commission provided for a hearing centered on the following general issues:

1. Whether CMEEC and MMWEC should receive allocations and if so, in what amount;

2. What is a reasonable amount of Niagara Project power up to ten percent to be allocated out-of-state;

3. The issue of in-state preference needs as tied to out-of-state preference allocations; and

4. The possible linkage of St. Lawrence Project No. 2000 allocations with Niagara Project allocations.

The Commission made certain preliminary findings in its February Order. It found under the authority of *Vermont* that Massachusetts and Connecticut are neighboring states within economic transmission distance, within the meaning of the NRA. (14 FERC ¶ 61,128, p. 61,232) Also under the *Vermont* case, the Commission found that the NRA does not require PASNY to

6. The original intervenors were: Allegheny, Vermont, the City of Cleveland, Consolidated Edison Company, the Municipal Electric Utilities Association of New York (MEUA), New York State Electric & Gas Corporation and the New York State Energy Office. During the course of the proceeding, late interventions were sought by and granted to Rochester Gas and Electric Company, a group of investor-owned utilities in Massachusetts, MTA and AMP-Ohio.

allocate a full 10 percent of Niagara power to out-of-state preference customers, but only a reasonable amount up to 10 percent. (*Id.*) Further, the Commission "specifically reject[ed] PASNY's contention that PASNY's discretion in allocating power to out-of-state preference customers is not subject to Commission review." (*Id.*) Finally, the Commission rejected New York State Electric and Gas Company's (NYSEG's) argument that the Commission lacked jurisdiction to affect or abrogate NYSEG's contract with PASNY. The Commission in its above-cited order stated (14 FERC ¶ 61,128, p. 61,233):

> The Niagara Act gives authority to the Commission, in the event of disagreement, to determine and fix the portion of power to be made available to the out-of-state preference entities and leaves, at least in the first instance, to PASNY the responsibility for accommodating the Commission's determination.

The Commission clarified its February Order in its order issued March 4, 1982, 18 FERC ¶ 61,217 (March Order) which answered in the affirmative the question of whether evidence should be presented regarding Niagara Project capacity, and reaffirmed that "out-of-state entities are not always entitled, as a matter of law, to allocations aggregating a full ten percent of project power." (*Id.* at p. 61,440) By stipulation among the parties, the issue of Niagara Project capacity was dropped and the figures developed in *Vermont* were adopted. (Tr. 230-49)

By motion filed October 22, 1981, Vermont sought to dismiss MMWEC's complaint for lack of standing. In its March Order, *supra*, the Commission denied that motion, finding that, "Although it is not clear whether MMWEC was duly authorized to act as an agent for (the Massachusetts Department of Public Utilities) at the time it filed its complaint, it appears that it now has that authority." Vermont's application for rehearing of this order was denied by operation of law on March 5, 1982.

A motion by the Municipal Electric Utilities Association of New York State (MEUA) to limit the participation of Vermont for lack of standing on the ground that Vermont does not qualify

as a preference customer was denied by order of the Presiding Judge issued January 21, 1982. The Presiding Judge found that whether Vermont sought more power than it had contracted for and whether it legally qualifies as a preference customer were questions to be addressed at these hearings.

Following prehearing conferences, extensive discovery procedures were undertaken; prepared testimony was filed and hearings were held commencing on April 13, 1982, and continuing through May 12, 1982. The record consists of 3805 pages of transcript, 259 offered exhibits, and numerous items by reference. Initial briefs were filed on July 23, 1982, and reply briefs on August 30, 1982. To provide a further opportunity to respond to the arguments raised by the various parties and to permit the parties to address the impact of the Commission's Opinion No. 151 on issues in this proceeding (issued October 13, 1982), third and fourth round briefs were filed on November 12 and December 7, 1982, respectively.[7]

PREVIOUSLY RESOLVED LEGAL ISSUES

The Commission, in previous determinations involving disputes as to allocation of Niagara Project power, has made findings of law that are binding on the Presiding Judge in these proceedings, notwithstanding the parties' attempts to relitigate the issues underlying these findings. An enumeration of issues that the Commission has already resolved demonstrates that the complexity of this case does not extend quite as far as the parties' briefs may indicate. Following is a listing of the Commission's rulings which are found to be controlling here. However, as noted above, the Commission has issued a temporary stay of Opinion No. 151 pending reconsideration on petitions for rehearing. Therefore, reference below to Commission views expressed in Opinion No. 151 is not for the purpose of citing a supporting precedent.

7. By order issued September 27, 1982, the Presiding Judge denied the petition to intervene and motion for leave to file a memorandum of law as *amici curiae* filed by the American Public Power Association and the National Rural Electric Cooperative Association on August 30, 1982.

Rather, it is for the purpose of discerning to what extent, if any, the Commission has indicated a willingness to depart from precepts pronounced in *Vermont* and in the procedural orders issued in the instant proceeding.

1. VERMONT, CONNECTICUT, MASSACHUSETTS, OHIO, AND PENNSYLVANIA ARE ALL "NEIGHBORING STATES WITHIN ECONOMIC TRANSMISSION DISTANCE."

In *Vermont*, the FPC addressed issues raised in a complaint proceeding in which Vermont contested PASNY's allocation of 30 MW of project power to Allegheny. In ruling on the complaint, the FPC confronted the issue of whether Pennsylvania and Ohio are the only neighboring states, within the meaning of the NRA, to which PASNY may properly allocate project power. The FPC held as follows (55 FPC at 1113):

> In view of the fact that the literal language of the Act is not restrictive of the term "neighboring states", that the legislative history clearly favors no particular state(s), and that the Act requires the power to be made available "in such manner as to encourage the widest possible use," we agree with the Administrative Law Judge that we should follow the plain meaning of the language. This clearly would include Vermont as a neighboring state of New York. Furthermore, we note that Congress could have specifically designated Ohio and Pennsylvania in the Act as sole recipients of Niagara power, but did not do so. [Footnotes omitted]

The Commission reaffirmed this holding in its February Order in this proceeding. There, the Commission confirmed that the NRA did not limit out-of-state allocations to Ohio and Pennsylvania. (14 FERC ¶ 61,128 at p. 61,232)

It is thus clear from the Commission's rulings in the above-cited cases that the term "neighboring states" under the NRA at least encompasses the states of Vermont, Connecticut, and Massachusetts, as well as Ohio and Pennsylvania.[8]

8. This ruling was re-affirmed by the Commission in its March Order, 18 FERC ¶ 61,217, p. 61440.

2. THE NRA DOES NOT, AS A MATTER OF LAW, REQUIRE PASNY TO ALLOCATE A FULL 10 PERCENT OF PROJECT POWER TO OUT-OF-STATE ENTITIES.

In *Vermont* the FPC determined that the NRA does not require allocation of a full 10 percent of project power to out-of-state users. The FPC unequivocally stated that "the [NRA] does not require PASNY to sell 10 percent of project power to out-of-state preference customers, but only that PASNY make a reasonable portion of project power—up to 10 percent—available to those customers." (55 FPC at 1120) The Commission, in its February Order issued in the instant proceeding, reaffirmed that ruling, finding that "[n]othing in the complainants' pleadings sets forth anything new to change our decision on this issue." (14 FERC ¶61,128, p. 61,232) In Opinion No. 151, the Commission approached the issue from the perspective of the in-state preference customers and confirmed that "80 percent appears to be the *minimum* rather than maximum percentage of preference power required for preference customers within New York." (*Mimeo.*, p. 35, n. 39)[9] Thus, the Commission has made clear its conclusion that the NRA does not, as a matter of law, mandate allocation of a full 10 percent of project power to out-of-state entities.

3. ALL TYPES OF PROJECT POWER ARE SUBJECT TO THE PREFERENCE PROVISIONS OF THE NRA.

The FPC, in *Vermont*, affirmed the Administrative Law Judge's finding that "project power under the [NRA] was not limited to firm power, but included all of the various categories of power marketed by PASNY from the Niagara project . . ." (55 FPC at 1118). The outcome of the instant proceeding, therefore, is bound by this determination that project power subject to the preference provisions of the NRA is not limited to firm power.

9. *See also* the Commission's March Order in these proceedings, 18 FERC ¶61,217, p. 61,440.

4. THE COMMISSION HAS THE AUTHORITY TO ABROGATE EXISTING CONTRACTS IN FULFILLMENT OF ITS DUTIES UNDER THE NRA.

Certain parties to the instant proceedings have sought to establish the principle that the Commission cannot alter or abrogate existing contracts between PASNY and its present customers. The Commission summarily rejected that contention in its February Order in which the Commission ruled that (14 FERC ¶ 61,128, p. 61,233):

> Under the clear terms of the Niagara Act, the Commission is granted jurisdiction to resolve disputes between applicants in neighboring states and PASNY over allocation of Niagara Project preference power. Whether or not NYSEG's contract must be reformed is a question not now before the Commission. The fact that the Commission has jurisdiction to require PASNY to allocate Niagara Project preference power in accordance with the Niagara Act cannot be denied. No contracts already in existence among the parties in this proceeding can in any way oust the Commission of its authority to resolve the dispute before us.

In Opinion No. 151, the Commission provided another ground to support its assertion of the authority to declare contract provisions void and unenforceable. There, the Commission found that its authority under the Federal Power Act (FPA) to interpret and enforce the terms and conditions in PASNY's license included the authority to void contract provisions not in conformity with the NRA's preference provisions which, as noted *supra*, are incorporated *verbatim* into PASNY's license. (*Mimeo.*, pp. 45-46) The Commission's authority to void or modify contract provisions not in conformity with the preference provisions of the NRA therefore derives from both the NRA and FPA.

Thus, in resolving the dispute as to the out-of-state allocation of Niagara power, the Commission's disposition in the present proceedings is not limited by existing contractual arrangements.

5. THE COMMISSION CAN REVIEW PASNY'S ALLOCATION DECISION DE NOVO, AND NEED NOT DEFER TO PASNY'S DISCRETION IN ITS OUT-OF-STATE ALLOCATIONS.

The Commission's specific statements in its February Order in this proceeding and in Opinion No. 151, coupled with the inferences to be drawn from *Vermont*, lead inexorably to the conclusion that the Commission has ruled on the scope of review to be accorded to PASNY's allocation decision. The Commission has determined that the NRA requires nothing less than *de novo* review of PASNY's out-of-state allocation, and stated as much in its February Order (14 FERC ¶ 61,128, p. 61,232-33):

> [W]e specifically reject PASNY's contention that PASNY's discretion in allocating power to out-of-state preference customers is not subject to Commission review .... By the very terms of the Niagara Act and the Niagara Project license, the Commission is granted the power to resolve disputes between the Licensee and any states concerning the allocation of Niagara Project power.

In addition to the above-cited, very specific rejection of PASNY's argument that its out-of-state allocations are discretionary and thus non-reviewable, the Commission expressly directed the Presiding Judge to supervise the making of a complete record upon which a decision on allocations could be based (*id.* at p. 61,232):

> What constitutes a reasonable amount [of power] is an issue that can only be addressed upon examination of all relevant circumstances in an evidentiary hearing.... The Presiding Judge shall take evidence to determine the proper allocation of firm and other project power to be made to out-of-state preference entities.

The Commission's statements in its February Order leave no room for argument as to what the Commission's role is in this complaint proceeding. The Commission will discharge its obligation under the NRA "after public hearings, [to] determine and fix the applicable portions of power to be made available [out-of-

state] . . ." [10] by compiling a complete record in the instant proceeding and rendering a decision thereon. The only instance in which the Commission may defer to PASNY's discretion is in conceding to PASNY "in the first instance . . . the responsibility for accommodating the Commission's determination." (14 FERC ¶ 61,128, p. 61,233)

This view of the Commission's responsibilities under the NRA is consistent with its expressions in *Vermont*. There, as in the instant proceeding, the complainants, pursuant to 16 U.S.C. § 836(b)(2) of the NRA, protested PASNY's out-of-state allocations. The FPC afforded *de novo* review to the allocation in question, and on the issue of what deference to accord to PASNY's decision, stated (55 FPC at 1117):

> It is difficult . . . to give much weight to PASNY's decision favoring Allegheny because there is nothing in the record to show that PASNY had any more evidence to consider than exists in the record before us. Furthermore, the decision by PASNY's Board of Trustees fails to enumerate the basis for that decision. Thus we conclude that, although we can consider PASNY's original decision, it is not helpful to us.

Furthermore, as the Commission iterated in Opinion No. 151, the Commission has the authority under the FPA to interpret *and enforce* the terms of PASNY's license. (*Mimeo.*, p. 45) That authority necessarily includes the authorization to take evidence and render a decision upon the question of whether PASNY has complied with its license. Thus, on the basis of the FPA as well, the inquiry in this proceeding must take the form of *de novo* review.[11]

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10. 16 USC § 836(b)(2).

11. The Commission reiterated its rejection of any manner of review other than *de novo* in its March Order issued in these prodeedings (18 FERC ¶61,217, p. 61,440):

> The plain language of the statute clearly specifies not only that PASNY's calculation of a "reasonable portion" is reviewable but also that the Commission may determine *de nova* the amount of power to be made available to neighboring States.

It is therefore clear that the Commission is free to defer or not to PASNY's decision, and can make its own decision on the basis of the record before it. All arguments to the effect that the Commission is limited to something less than *de novo* review must be, and are therefore, rejected.

6. MMWEC IS NOW MASSACHUSETTS' DESIGNATED BARGAINING AGENT AND HAS STANDING TO SEEK AN ALLOCATION OF NIAGARA POWER ON THAT STATE'S BEHALF.

In its March Order in the instant proceeding the Commission denied a motion by Vermont to dismiss MMWEC's complaint for lack of standing. The NRA requires that if a state has designated a bargaining agent for the procurement of Niagara power, PASNY must deal with only that agent in that state. (18 USC § 836(b)(2)) Vermont had argued that MMWEC lacked standing because it was not the designated bargaining agent for the Commonwealth of Massachusetts, and thus MMWEC was not authorized to seek an allocation of power from PASNY for that state. The Commission responded that (18 FERC ¶ 61,217, p. 61,440):

> Although it is not clear whether MMWEC was duly authorized to act as an agent for DPU [Department of Public Utilities] at the time it filed its complaint, it appears that it now has that authority. The October 30, 1981, letter from the Chairman of the DPU to the general manager of MMWEC . . . authorizes MMWEC to act as the bargaining agent for the Commonwealth of Massachusetts in this proceeding.

Thus, the status of MMWEC as a proper party to seek an allocation of power for Massachusetts is not open to question.

7. VERMONT IS ELIGIBLE FOR A PORTION OF THE OUT-OF-STATE ALLOCATION.

A much-litigated point in this proceeding is the question of whether Vermont is properly a recipient of preference power

under the NRA. Vermont's situation differs markedly from those of the other present and potential recipients of Niagara power. AMP-Ohio, MMWEC, and CMEEC are organizations whose members are municipal electric distribution systems. Allegheny is a rural electric generation and transmission cooperative whose members receive and distribute power on a non-profit basis. The complainants, with AMP-Ohio and Allegheny, have demonstrated by exposition of the legislative history of the NRA that the entities to which they distribute Niagara power fit into the definition of "public bodies and non-profit cooperatives" for which a preference in the allocation of power was established in the NRA, as that definition was refined in the Opinion No. 151. Thus, no valid dispute exists as to their eligibility for allocations of Niagara power.

However, the application of the preference provisions of the NRA to Vermont is less clear. The Vermont Public Service Board purchases power from PASNY and subsequently re-sells the power to both publicly-owned and privately-owned utilities in the state. (Tr. 2619-20) The benefits of the relatively low-cost Niagara power are passed through to the utilities' (both publicly-owned and privately-owned) residential customers by means of lower-cost power. (Tr. 2687-88) The controversy as to Vermont's status centers around the fact that Vermont distributes its Niagara power to consumers by means of sales to both investor-owned and consumer-owned utilities.

Resolution here of the issue as to Vermont's preference status is overwhelmingly prejudiced by the FPC's decision in *Vermont*. In that proceeding, the FPC confronted factors and legislation identical to those in the present proceeding. Fully cognizent of Vermont's manner of distribution of the Niagara power through investor-owned utilities, the FPC nevertheless stated (55 FPC at 1113):

> [W]ith respect to Vermont's eligibility to receive this power, the Act directs PASNY in disposing of half of the project power to "give preference and priority to public bodies and non-profit cooperatives." Allegheny admits PSB [of Vermont] is a public body but then argues that

> PSB should not receive power as a preference customer because it sells approximately 80 percent of its Niagara power at wholesale to non-preference customers. Allegheny further disputes PSB's showing that PSB prevents, through its regulatory powers, utility companies from making a profit on Niagara power. Allegheny simply states it is not convinced PSB ensures that all the benefits of Niagara power flow to the consumers. The Act does not preclude distribution of Niagara power through investor-owned utilities to those intended to be benefited. The Administrative Law Judge found that there exists ample support in the record that the ultimate consumer in Vermont is benefited through rate reduction. We believe he was correct and that Allegheny's argument is strained and unpersuasive in view of the plain reading of the Act and PSB's rate reduction technique. [Footnote omitted]

In light of *Vermont*, and in the absence of any change in the factual circumstances, it is necessary to concede that the Commission has confronted and resolved in Vermont's favor the issue of whether it is a proper preference customer.

Certain parties have argued, on various grounds, that *Vermont* in no way binds the Presiding Judge in the instant proceeding. They have asserted that the above-cited passage in *Vermont* is mere *dicta;* that the principles of *stare decisis, res judicata,* and collateral estoppel do not or should not apply; and that the Commission did not have the full exposition of the preference clause issue in *Vermont* that has been provided in the present proceeding. These arguments notwithstanding, the parties have presented no rationale for disregarding the FPC's previous determination as to Vermont's eligiblity to receive preference power. The FPC ruled on facts identical to those presented in the instant proceedings; no change whatsoever has occurred in Vermont's manner of distribution of Niagara power. The Presiding Judge is not free to disregard the Commission's ruling in *Vermont* absent a showing of changed circumstances.[12]

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12. *Delmarva Power & Light Co.*, Docket No. ER82-751, Order issued October 29, 1982 (21 FERC ¶ 61,050).

These parties further argue that the Commission in Opinion No. 151 construed the NRA in a manner inconsistent with the construction embraced by the FPC in *Vermont*. They point out that in Opinion No. 151 the Commission refined the definition of preference customers, which the NRA designates as "public bodies and non-profit cooperatives", by resolving that only "those governmental entities that resell and distribute the preference power bodies for the purpose of qualifying under the prefence clause. (*Mimeo.*, p. 52) These parties claim that, under this definition Vermont can no longer claim preference status because Vermont is in no sense a distributor of power at the retail level, as required by Opinion No. 151; rather, it is a broker selling power at wholesale to investor-owned utilities, as well as municipals and cooperatives. Further, they point out, Vermont cannot be a distributor because it does not own its own distribution system. It acts as a conduit for Niagara power by selling the power to other companies for distribution to consumers.

These parties highlight as well that, in Opinion No. 151, the Commission determined that one purpose of the NRA preference provision was to foster yardstick competition between publicly-owned and privately-owned distribution systems. The achievement of yardstick competition would occur by means of the purchase of inexpensive Niagara power by consumer-owned power companies, *i.e.*, municipal systems and rural cooperatives, who would compete with privately-owned companies in sales of power to consumers. The low rates charged by the consumer-owned companies would operate as a yardstick and force the privately-owned companies to maintain the lowest possible rates. Opinion No. 151 found yardstick competition to be a goal of the NRA in the course of its determination that preference entities were entitled to receive power for the industrial and commercial, as well as rural and domestic, needs of their customers.

These parties assert that, to accomplish the legislative purpose of encouraging yardstick competition between consumer-owned

and privately-owned power companies, the Commission must permit the sale of preference power only to publicly-owned distribution systems selling at retail, because it is these latter distributors, and not the State Public Service Board, who engage in retail sales and are the intended participants in yardstick competition. If privately-owned companies as well as publicly-owned companies receive preference power and resell it to consumers, the desired effects of yardstick competition, as described above, are not achieved. In their view, Vermont cannot validly claim the status of a preference customer. Vermont is properly considered a bargaining agent in their theory of the operation of the preference clause.

Upon review of these arguments, the Presiding Judge has concluded that Opinion No. 151, assuming *arguendo* that it is not modified on rehearing, does not require any departure here of the finding in *Vermont* that Vermont is a proper preference customer. This conclusion is based on a number of factors, most prominent among which is that the Commission nowhere in Opinion No. 151 explicitly overruled or in any way criticized *Vermont*. Importantly, the Commission acknowledged in orders leading to the hearing which culminated in Opinion No. 151 that the issue of Vermont's status had been resolved in *Vermont* and was not open to further litigation.[13] Thus, the Presiding Judge has discerned no express Commission intent to undo the findings in *Vermont* in Opinion No. 151.

Furthermore, the marked difference in the factual settings of Opinion No. 151 and the present proceeding renders inappropriate a slavish adherence to the underpinnings of Opinion No. 151. Opinion No. 151 resolved issues as to the in-state allocation of Niagara power. Concededly, it included an interpretation of the preference clause which is applicable to out-of-state allocations as well, by virtue of 16 USC § 836(b)(1). However, to the extent, if any, that Opinion No. 151 is inconsistent with *Vermont*, the Presiding Judge is bound by *Vermont*, (1) in view of the fact that *Vermont* was geared specifically to out-of-state allocations, and

13. *MEUA* v. *PASNY*, Docket No. EL78-24, Order issued November 2, 1979.

(2) in the absence of any indication by the Commission that *Vermont* is to be ignored.

This is not to infer, however, that Opinion No. 151, when viewed as a whole, in any way requires a different resolution of the issue of Vermont's preference status than did *Vermont*. Just as Opinion No. 151 nowhere explicitly overruled *Vermont*, that opinion does not overrule by inference. Arguments to the effect that Vermont does not qualify for preference power because it is not a distribution company are not persuasive. The determination in Opinion No. 151 that a public body must be involved in a distribution function was used there to terminate MTA's status as a preference customer, because MTA is a consumer of the Niagara power it receives. MTA's non-distribution status is simply not analogous to Vermont's situation, in view of the fact that Vermont does not consume any of the energy it receives but rather resells that power to publicly-owned and privately-owned companies for ultimate sale to consumers. In fact, Opinion No. 151 seemingly endorses the preference status of an in-state public body, New York City, who will distribute the power *via* an investor-owned utility, Consolidated Edison of New York.[14]

As to the question of yardstick competition, it is difficult to disagree with the conclusion that the purchase by Vermont of preference power and the subsequent resale to consumers *via* both publicly-owned and privately-owned power systems renders impossible the achievement of yardstick competition. Clearly, if all Vermont companies have access to inexpensive Niagara power, none will act as a moderating influence on the rates of any of the others. Vermont's particular manner of distributing power thwarts the attainment of yardstick competition. The absence of a potential for yardstick competition in Vermont caused by Vermont's distribution of power through investor-owned utilities as well as municipals and cooperatives, however, does not require a rejection of Vermont on that basis. Given the relatively small amount of power allocable to out-of-state entities, it is indeed

14. Opinion No. 151, *mimeo.*, p. 52, n.63.

easy to accept the fact that yardstick competition can play, at most, a minimal part in the out-of-state allocations.

Furthermore, if the Presiding Judge were to find that the goal of attaining yardstick competition was the controlling principle in the establishment of the out-of-state allocations and on that basis concluded that only Vermont's publicly-owned systems were entitled to an allocation of Niagara power, the true purpose of the NRA would be subverted. Power currently distributed to Vermont's domestic and rural consumers *via* investor-owned utilities would be re-allocated to publicly-owned systems both in Vermont and in the neighboring states.[15] These publicly-owned systems would sell the inexpensive Niagara power to *all* of their customers because, as the Commission noted in Opinion No. 151 (*mimeo.*, pp. 61-64), if the goal of yardstick competition is to be achieved, the publicly-owned systems must serve the full needs of their customers.[16] The bulk of the complainants' (MMWEC and CMEEC) load is industrial and commercial. (Exh. 100) Thus, the result of a shift of Niagara power from the domestic and rural users in Vermont served by investor-owned utilities to publicly-owned systems elsewhere would inure to the benefit of industrial and commercial users. (*See* definition of "domestic and rural" consumers adopted herein, *infra* at 59.)

Although this result would pay appropriate homage to the goal of yardstick competition by confining sales of preference power to publicly-owned systems, it more importantly would fly in the face of the express intent of Congress in the NRA, which is to assure that preference power is used to benefit consumers, particularly domestic and rural consumers. (18 USC § 836(h)(1)). Opinion No. 151 concedes that yardstick competition is a "vehicle" selected by Congress to assure the accomplishment of the express

15. Some of this power could possibly go to New York, depending on the allocation method adopted.

16. Even with the allocation methodology endorsed *infra*, the Commission does not have control over the delivery of that power by publicly-owned systems to their individual customers, and thus cannot assure that only rural and domestic users receive the benefits of Niagara power.

goal that "*the people, as consumers of electric power*, and particularly domestic and rural consumers, are to be the primary beneficiaries" of preference power. (*Mimeo.*, p. 47) This "vehicle" cannot, however, be elevated above the express Congressional purpose. The FPC in *Vermont* based its acceptance of Vermont's eligibility to receive preference power on this very point, that Vermont's manner of distribution assures that domestic and rural consumers are the primary beneficiaries of Niagara power. That ruling endures and is embraced in Opinion No. 151. It is concluded, therefore, that the effort to establish yardstick competition does not provide a rationale for disturbing Vermont's method of distributing Niagara power.

Further, any effort to attain the goal of yardstick competition would inevitably result in a substantial hardship to Vermont's municipal and cooperative systems, who even the complainants concede are legitimate preference customers. Niagara power is presently transported from the Vermont border to in-state utilities through the lines of investor-owned utilities, because the Vermont Public Service Board owns no facilities of its own. (Tr. 2609-10) If the investor-owned utilities' access to Niagara power were cut off, and if those utilities refused to transport the power, the consumer-owned companies would be forced to construct their own lines to transport the power, thereby increasing the cost of power ultimately delivered to preference customers.

Finally, the Presiding Judge takes note of the fact that Vermont has grown dependent on the Niagara power which it has received over the last 20 years. This does not imply, however, that Vermont has any vested legal or equitable right in a long-term continuity of receipt of Niagara power. Vermont's argument that it has provided economic support for the project from its inception and received Niagara power over an extended time, and thus is entitled to priority over later applicants has no basis in the NRA, and indeed contravenes the directive in the NRA that the power "shall be made available . . . in such manner as to encourage the widest possible use . . ." (18 U.S.C. § 836(b)(1)). The NRA

does not permit such "grandfathering in" of the existing recipients, and such recipients have no superior legal rights over latecomers. Therefore, the question of how much power Vermont is entitled to receive in the future is not resolved by either reference to the amount of power that it has received in the past or its alleged past economic contribution to the project. That question is resolved by the application of the allocation method adopted and discussed *infra* as well as the evidence on the issue of its capability to receive the power.

For the foregoing reasons, it is concluded that Vermont is proper recipient of preference power.

8. THE MTA IS NOT A PUBLIC BODY AND THUS IS NOT ENTITLED TO AN ALLOCATION OF PREFERENCE POWER.

In Opinion No. 151, the Commission confronted head-on the issue of whether the MTA is a public body entitled to an allocation of preference power. The Commission (*mimeo.*, pp. 49-54) reviewed the legislative history and determined that a public body must be a *distributor* or reseller, not a *user*, of power; thus, the Commission held, the MTA does not qualify for the status of a public body.

As noted *supra*, the Commission issued an order granting rehearing for purposes of further consideration and granting stay of Opinion No. 151 on November 30, 1982. As a result, Opinion No. 151's conclusion as to MTA's preference status is not yet binding in the instant proceeding. However, based upon the Presiding Judge's independent review of the legislative history of the NRA, it is concluded that MTA is not eligible for receipt of preference power for the same reasons given by the Commission. *See* legislative history cited in Opinion No. 151, *mimeo*, pp. 49-54.

THE AMOUNT OF POWER TO BE MADE AVAILABLE OUT-OF-STATE

As noted earlier, the NRA specifies that 50 percent of the power generated by the Niagara Project is preference power, to

be made available to preference customers in New York and in neighboring states. *See* Opinion No. 151, *mimeo.*, p. 80, where the Commission states that "*public bodies and nonprofit cooperatives are entitled by the NRA to satisfy their needs from 50 percent of every classification of Niagara power and energy.*" Thus, out of 2,480 MW of project power, which includes firm and diversity power (1,880 MW), peaking A power and peaking B power (400 MW), and nonfirm power (200 MW), the in-state and out-of-state preference customers are entitled to a total of 1,240 MW.[17] Of this total amount available to satisfy preference customer needs, 940 MW is firm power, representing one-half of the project's firm power output of 1880 MW.

The NRA further provides that, out of the amount reserved for the needs of preference customers, a reasonable amount, not exceeding 20 percent of the total preference power, is to be made available for use in neighboring states. Thus, out of 1,240 MW of total project power, 940 of which is firm power, the out-of-state entities may receive a maximum of 248 MW of all project power, with up to 188 MW of that latter amount being firm power. Conversely, the in-state preference customers may receive a minimum of 992 MW of all project power, at least 752 MW of which is firm power. The NRA directs the Commission to make a *de novo* determination of the amount that would constitute a reasonable allocation in the event of a dispute, as has occurred here.

The NRA gives no guidance as to what the ingredients of a reasonable amount are. Significantly, it does not state unequivocally that a reasonable amount is that amount that remains after the needs of the in-state preference customers are satisfied. Indeed, the NRA provides only a cap on the amount of power that may be allocated out-of-state. The record in this proceeding demonstrates, however, that it is not necessary to sift through the data offered by the in-state and out-of-state users to determine

17. The amount of Niagara Project nonfirm capacity depends on the amount of water available. Under the most adverse water conditions, 200 MW of nonfirm capacity is available. Nonfirm capacity is not sold under contract whereas firm and peaking capacity is. (Exh. 12, p. 5; Exh. 85, p. 5; Exh. 186, pp. 7-8; Exhs. 63-65, 86, 246)

which among these two classes of competing users has made a showing adequate to justify an allocation of a particular amount. At the present time, PASNY has made only 406 MW of firm power available to serve the needs of in-state preference customers. This represents only 21.6 precent of the total firm project capacity, and is far below the 40 percent minimum to which in-state preference customers may be entitled. The power needs of these in-state preference customers will not reach the 40 percent, or 752 MW, level until the winter of 1986/87, based on PASNY's projections of peak demand. (Exh. 85, pp. 3-6; Exhs. 86, 87) The contracts of the current in-state and out-of-state recipients of Niagara power expire in 1985 and a new allocation will govern after that time. PASNY has already concluded hearings related to post-1985 allocations. Given these facts, in conjunction with the showing of an aggregate out-of-state preference market requirement in excess of 10 percent (Tr. 356-59), there is every justification for making available a maximum 10 percent of project power to out-of-state preference customers.

Furthermore, the latitude which the NRA allows to PASNY and the Commission in establishing the amount of power to be made available out-of-state should not be used to defeat the Congressional intent of that Act. Congress prescribed that 50 percent of the project power was to be allocated to preference customers. If the Commission were to fail to direct PASNY to make available a full 10 percent of the project power to out-of-state preference customers, with the result that in-state non-preference customers received additional power, then the preference provision of the NRA would be turned on its head.

It is, therefore, concluded that the record fully supports a finding that PASNY be and is required to make available to out-of-state entities a full 10 percent to all types of project power. Whether each of the entities has the capability to avail itself of its allocable share will be discussed subsequently.

OUT-OF-STATE ALLOCATION METHODOLOGY, ENTITLEMENTS AND ALLOCATIONS

Having established that entities in Vermont, Pennsylvania, Ohio, Connecticut, and Massachusetts are eligible for an allocation of Niagara power, and that, on the basis of this record, those entities are entitled to an aggregate of 10 percent of all Niagara project power, we must now choose a method of apportioning that entitlement among those entities. In embarking upon the search for an apportioning methodology, it is important to bear in mind the breadth of the Commission's discretion in choosing among methods. The NRA prescribes no particular method of apportionment, giving rise to the assumption that the Commission, in light of its particular expertise in allocation of energy, has broad latitude in the exercise of its discretion.[18] Once a methodology is adopted, we will then proceed to a review of the record data applicable to that methodology in order to utilize, as nearly as possible, a consistent data base upon which will be calculated the power entitlement of each entity. Thereafter, an allocation determination will be made for each entity giving due consideration to any factual or equitable consideration reflected in this record.

1. The Apportioning Methodology

There were four methods proposed to apportion the out-of-state preference power among the six entities: (1) total customer kilowatt hours (proposed by CMEEC witness Gabriel B. Stern); (2) residential kilowatt hours (proposed by MMWEC witness Bruce W. McKinnon); (3) number of residential customers (proposed by Staff witness Billie E. Biggerstaff); and (4) number of residential customers and levels of unemployment (proposed by AMP-Ohio witness Donald A. Murry).

Staff calculated the number of residential customers for each of the out-of-state entities, and derived entitlement factors as follows (Exh. 192):

18. *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945).

Out-of-State Entities	Number of Residential Customers	Entitlement Factor (%)
CMEEC	47,100	6.72
MMWEC	255,361	36.42
Vermont	201,678	28.77
AMP-Ohio (City of Cleveland only)	39,920	5.69
Allegheny	151,147	21.56
Lansdale	5,856	0.84
Total	701,062	100.00%

Thus, of the aggregate Niagara power and energy available to the six out-of-state entities, CMEEC would get 6.72 percent, MMWEC would get 36.42 percent, etc.

Similarly, for the same six entities, CMEEC derived entitlement factors based on the total customer load. It compiled its data by measuring the energy at the delivery point(s) of each entity, without any distinction as to the end use of that energy after distribution. It then divided each amount by the combined energy of the six entities to arrive at its entitlement factors. (Exh. 13)

On the other hand, MMWEC's proposed method of utilizing residential kilowatt hours did rely on an end usage distinction among customers' loads. The residential kilowatt hour usage of each entity, as compiled by MMWEC, was divided by the combined residential kilowatt hours of the six entities to arrive at its proposed entitlement factors. (Exh. 23)

The results of three of the four proposed methods were as follows:

Out-Of-State Entities	Methodology Proposed		
	Total Kilowatt Hours (Exh. 13)	Residential Kilowatt Hours (Exh. 23)	Number of Residential Cust. (Exh. 192)
CMEEC	14.01%	4.33%	6.72%
MMWEC	51.02	44.86	36.42
Vermont	8.50	9.97	28.77
AMP-Ohio	6.46	4.95	5.69
Allegheny	18.74	35.04	21.56
Lansdale	1.27	0.85	0.84
	100.00%	100.00%	100.00%

In comparing the results obtained under these three methods, it is important to bear in mind that the figures used by CMEEC and MMWEC to obtain entitlement factors reflect their position on brief that, with regard to Vermont, only data related to Vermont's customers served by publicly-owned utilities should be considered. Only Staff's proposal includes data related to Vermont's customers served by investor-owned utilities.[19]

The fourth method, proposed by AMP-Ohio, considered the number of residential customers served by non-investor-owned utilities, and the unemployment levels of the neighboring states, based on figures compiled by AMP-Ohio. The results were a range of entitlement factors (Exh. 160, Sch. 10.0):

States	Residential Customers (%)	1981 Unemployment		Entitlement Factor (%)
		Number	(%)	
Connecticut	6.2	100,200	8.0	6.2 - 8.0
Massachusetts ...	21.9	218,400	17.5	17.5 - 21.9
Ohio	41.7	487,700	39.2	39.2 - 41.7
Pennsylvania	25.5	426,700	34.3	25.5 - 34.3
Vermont	4.9	11,800	0.9	0.9 - 4.9
	100.0% (Rounded)	1,244,800	100.0% (Rounded)	

In presenting above the methods proposed by the four parties, no attempt has been made to adjust the figures compiled and used by each of the four parties in order to place the four methods on a consistent base. Rather, the methods are presented just as they were proposed, with the identical figures used by the proponents. For example, the illustration of AMP-Ohio's method *supra* includes in the count of residential customers all residential customers served by non-investor-owned utilities in the State of Ohio, while the illustrations of the methods proposed by MMWEC, CMEEC, and Staff used data related only to service in Cleveland. The methods have been presented in this manner

19. Although MMWEC presented Exhibit No. 24 which shows an allocation on the basis of all Vermont residential customers served off of public and private systems, its position on brief is that the Vermont Department of Public Service is not an NRA public body. MMWEC's position is that only those residential customers served by publicly-owned facilities should receive Niagara power.

simply for a comparative review of methodology principles. After comparing the methods and their results and choosing which among them is most consistent with the purposes of the NRA, the figures pertaining to each of the out-of-state entities will be adjusted as the record requires to arrive at appropriate entitlement factors.

We turn first to the proposed total customer load methodology. Allocating Niagara project power by total customer load is the most definite of the four proposed methods, but it would not result in the domestic and rural customers being the primary beneficiaries of the Niagara power and thus would fly in the face of the dictates of the NRA.[20] As may be ascertained below, applying just Staff's data compilations for consistency in the total load and residential load methodologies, a wide and unjustifiable distortion in entitlements will occur if total load instead of residential load is relied upon (Exh. 187):

Out-of-State Entities	Residential Load (MWH)	Entitlement Factor (%)	Total Load (MWH)	Entitlement Factor (%)
CMEEC	290,168	5.74	1,251,867	10.11
MMWEC	1,650,470	32.65	4,769,953	38.53
Vermont	1,611,010	31.87	3,994,368	32.26
AMP-Ohio	182,477	3.61	577,346	4.66
Allegheny	1,289,063	25.50	1,675,155	13.53
Lansdale	31,553	0.63	113,090	0.91
Total	5,054,742	100.00%	12,381,779	100.00%

In particular, note the difference in the resultant entitlements between CMEEC and Allegheny. Even though Allegheny represents 25.50 percent of the total residential usage, the total load method would allocate only 13.53 percent of the out-of-state portion to it. On the other hand, CMEEC represents 5.74 percent of the total residential usage, but it would receive 10.11 percent of the Niagara power. Thus, the total load method of

20. Domestic and rural customers exclude commercial and industrial customers. See Opinion No. 151 (21 FERC at 61,134-36). According to the evidence in this record, domestic and rural customers include residential customer groups as well as small farm classes. (Exh. 21, p. 9; Exh. 18, p. 42; Exh. 44, p. 7)

allocation would place less emphasis upon residential usage.[21] Furthermore, it would place no constraint on an applicant from actively seeking potential commercial/industrial customers in order to increase its share of Niagara power. The total load method results in a distortion of the allocation, to the benefit of systems serving large industrial loads, and wanders from a primary NRA purpose which is to benefit rural and domestic consumers.[22]

Further, the NRA directs that Niagara power be allocated "in such manner as to encourage the widest possible use." (18 USC § 836 (b)(1)) This is reasonably construed to refer to a numerical, not volumetric, dispersion of power. As Witness Murry for AMP-Ohio correctly noted, the concept of widest possible use implies the dispensation of Niagara power to a large number of customers. (Exh. 159, p. 14) Because of the size of commercial/industrial loads, the total load method would involve a lesser number of total customers—residential, commercial and industrial customers—than would the per residential customer method. Adoption of the total load methodology would dilute the meaning of "widest possible use."

Turning now to the toal residential load concept, although the NRA distinguishes between residential customers and nonresidential customers, it does not make a distinction between the two residential customer groups, *i.e.*, domestic and rural customers. The total residential load methodology would make such an unwarranted distinction, as the following chart illustrates:

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21. Allegheny's witness David L. Mohre pointed out that because of MMWEC's and CMEEC's large percentage of industrial and commercial loads, Allegheny, who has predominately residential loads, would be at a disadvantage. (Exh. 99, p. 6)

22. Consider a hypothetical example. Two preference customers have only residential loads which are exactly the same. They would be entitled to an equal share of Niagara power. If one preference customer began serving an industrial customer, a portion of the Niagara power would go to serve the industrial customer. This would result in less power for the residential loads of both preference customers. Additionally, adoption of a total load methodology would enhance each preference customers' desire to add large commercial/industrial loads.

Out-Of-State Entities	Residential KWH Per Customer	Entitlement Factor (%) Number of Residential Cust.	Entitlement Factor (%) Residential KWH
CMEEC	6,161	6.72	5.74
MMWEC	6,463	36.42	32.65
Vermont	7,988	28.77	31.87
AMP-Ohio	4,571	5.69	3.61
Allegheny	8,529	21.56	25.50
Lansdale	5,388	0.84	0.63
		100.00%	100.00%
Average	7,210 KWH/customer		

The existence of differences in residential KWH per residential customer results in a customer with more consumption getting more of an allocation if the residential load method is used. The preference entity gets a greater allocation when its residential KWH per residential customer is above the average of 7,210 per customer.[23]

For example, in 1980 the City of Cleveland residential load was 182,477 MWH. If had 39,920 residential customers for an average usage of 4,571 KWH per residential customer, as shown above. Allegheny, which is a cooperative serving rural customers (Exh. 99, p. 5), had nearly double that amount—8,529 KWH per residential customer. (Exh. 187) Thus, the residential load method of allocation would tacitly distinguish between domestic and rural customers, and discriminate in favor of the latter. This is not the case when using the per residential customer method where each residential user would be entitled to the same amount of Niagara power.[24]

The remaining two methods of allocation, *i.e.*, those proposed by Staff and AMP-Ohio, are both based upon the number of residential customers (domestic and rural) but the one proposed by AMP-Ohio is supplemented by *relative* unemployment rates: Ohio had an unemployment rate of 9.4 percent in 1981, but the total number of unemployed in Ohio was about 39.2 percent of

23. Staff's figures were used here for consistency (Exh. 187).

24. In choosing between the per residential customer method and the residential load method, the AMP-Ohio witness preferred the former method since he believed the residential load method may dilute the meaning of widest use. (Exh. 159, p. 15)

the total unemployed in the five affected neighboring states. This latter figure was one of the unemployment rates used by AMP-Ohio in determining its entitlement factor (see AMP-Ohio's entitlement table, *supra*). According to AMP-Ohio, unemployment takes into consideration more directly the economic well-being of the domestic and rural customers.

The unemployment rates used, however, are not reliable for the purpose of computing appropriate energy entitlements. First, the relative unemployment rates are statewide figures; they are not unemployment rates for the service territories of preference customers. Secondly, as noted below, the unemployment rates themselves vary significantly from year to year (Exh. 160):

	Unemployment Rate (%)				
	1976	1977	1978	1979	July 1981
Connecticut	9.5	7.0	5.2	5.1	6.3
Massachusetts	9.5	8.1	6.1	5.5	6.7
Ohio	7.8	6.5	5.4	5.9	9.4
Pennsylvania	7.9	7.7	6.9	6.9	8.1
Vermont	8.7	7.0	5.7	5.1	5.4

Although it would be a desirable goal to ensure that those who are the neediest are actually being benefited the most by Niagara power, AMP-Ohio has not presented any evidence which could reasonably support a conclusion that this goal is attainable through the adoption of its methodology.

From the foregoing discussion and analysis it is concluded that the most reasonable method of apportioning Niagara power among out-of-state preference customers is one which uses the number of residential customers (domestic and rural) served by each preference customer. CMEEC's proposal to allocate on the basis of total load distorts the entitlement factors in favor of systems serving a greater industrial load, and thus fails to further the Congressional purpose in the NRA to allocate preference power for the benefit of rural and domestic users. CMEEC's method also fails to fulfill the Congressional mandate of encouraging the widest possible use of the power because it would permit

an allotment of large amounts of power to systems serving relatively few large industrial customers. MMWEC's proposed method of allocation on the basis of residential load discriminates in favor of rural customers to the detriment of domestic users, when the NRA makes no distinction between those types of users. AMP-Ohio's hybrid method of allocation on the basis of the number of residential customers served by non-investor-owned utilities and the relative unemployment in the state is unacceptable not only because it relies on fluctuating unemployment figures but moreover, because no correlation has been shown between those figures and the areas where the recipients of the power are located. In contrast, Staff's method of allocating on the basis of the number of residential customers (domestic and rural) served by a preference customers pays proper heed to the Congressional directives that the primary beneficiaries of Niagara preference power are to be rural and domestic users, and that the power is to be made available to preference customers in a manner which encourages the widest possible use.

In arriving at this conclusion, the Presiding Judge has considered the argument made by CMEEC that the term residential customer is not uniformly defined in utility practice. For instance, CMEEC pointed out that master metered apartment dwellings would either not reflect the true number of residential customers receiving service or not be classified as residential. (Exh. 12, p. 9) But this does not provide sufficient cause to reject an otherwise acceptable methodology. CMEEC has not submitted any quantification of its example to support a conclusion that the asserted deficiency in Staff's data base compilation is of a significant dimension. Furthermore, the burden is on the parties seeking an allotment to make sure that such problems as master metered apartment buildings are properly accounted for. [25] We

25. CMEEC also stated that Allegheny included residential members who are not really residential, and that its customer classification is based upon transformer size. (Exh. 12, p. 9). However, Allegheny specifically accounts for those residential customers who are not really residential: there are 151,827 residential accounts which include 680 customers classified as "Other Consumers." (Exh. 99, p. 5 and Exh. 100, p. 1) Staff uses the difference of these numbers (151,147) in its

shall not proceed to a review of the record and make such adjustments to Staff's data as may be warranted.

2. The Entitlements

Having determined that Staff's method of apportioning power on the basis of the number of residential users is most consistent with the purposes of the NRA, the next task is to identify those residential users in each state who have a legal entitlement to Niagara power. By the term "legal entitlement," we mean those users who are in the class of consumers who whom Congress intended to benefit in the NRA, those ". . . domestic and rural consumers . . . in neighboring states . . ." who are to be the primary beneficiaries of Niagara power.

Before determining the breadth of the class of out-of-state beneficiaries of Niagara power, the first logical step is to define the smallest unit within the class: what users are "domestic and rural", within the contemplation of the NRA? Inconsistent Commission pronouncements complicate the definition.

In *Vermont* the FPC addressed the issue of whether the term rural users was limited to domestic, *i.e.* residential, users. In that proceeding, Vermont had argued that Allegheny's distribution of preference power to industrial and commercial users in rural areas was in violation of the NRA. The FPC rejected Vermont's argument, and agreed with Allegheny that the delivery of preference power to (55 FPC at 1116):

> . . . country stores, schools, gas stations, etc., and a few small industrial loads that are always found and needed in rural areas . . . was within the intent of Congress . . . and . . . if Congress did not intend such service, it would not have specified "domestic and rural" customers, but only domestic.

Under this definition, the term "domestic and rural consumers" includes rural industrial and commercial users. Staff's figures

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allocation. In addition, Allegheny does not state that it classifies residential customers by transformer size. It only classifies commercial and industrial customers that way. (Exh. 99, p. 5)

(Exh. 192) would thus have to be adjusted, at least in the case of Allegheny, to include such users.

However, the Commission recently in Opinion No. 151 expressed a different view as to the definition of domestic and rural users. There, the Commission recognized that the terms "industrial and commercial loads" and "domestic and rural loads" are mutually exclusive. (*Mimeo.*, p. 61) According to this view, a rural industrial load is not within the ambit of the term "domestic and rural". Staff's figures, (Exh. 192) which include only rural residential loads, would thus be correct.

In the face of this seemingly irreconcilable conflict, the Presiding Judge declines to second-guess the ultimate decision of the Commission as to the true meaning of the term "domestic and rural consumers." Rather than choose between the definitions discussed above, the Presiding Judge endorses and adopts PASNY Witness Deasy's definition of rural and domestic consumers as "residential and small farm classes" of users. (Exh. 44, p. 7) Witness Deasy's explanation of the term was unchallenged and thus stands as the only statement of the parties as to the meaning of the term "domestic and rural consumers." Furthermore, that definition is consistent with the NRA: both the terms "rural" and "domestic" are given meaning, and industrial and commercial users (albeit rural) are not included in the allocation and thus are not permitted to dilute the benefits of Niagara power.

Having defined the smallest unit, we must next determine the universe of such users who comprise the class of consumers having a legal entitlement to Niagara power. At the outset, it is obvious that this universe, depending on how it is defined, may have vastly varying dimensions. In defining the dimensions of the universe, we are guided by the same directives in the NRA as governed the choice of an apportioning method: the NRA directs the distribution of Niagara power for the benefit of domestic and rural users in a manner which encourages the widest possible use. The arguments made explicitly or implicitly by the various parties

will be reviewed to determine which conforms best to these directives.

Given the definition of domestic and rural users which was adopted above, the largest possible universe of consumers legally entitled to receive Niagara power consists of all residential and small farm consumers, whether served by preference entities or investor-owned utilities in the neighboring states. The argument that the universe may extend to that dimension and encompasses that number of users is at the very least supportable. The NRA states that domestic and rural users are to be the particular beneficiaries of Niagara power. As the FPC stated in *Vermont*, nothing in the NRA "preclude[s] distribution of Niagara power through investor-owned utilities to those intended to be benefited." (55 FPC at 1113) Further, the NRA directs that Niagara power be dispersed as widely as possible. Certainly, a dispersal based on the total number of eligible users in the neighboring states accomplishes that goal.

However, the adoption of a figure representing the total statewide number of residential and small farm users being served would run afoul of the NRA's further directive that public bodies and non-profit cooperatives be given preference in the receipt of Niagara power. If power were allocated on the basis of the state's total of domestic and rural users, we would fail to recognize the fact that all power distributed out-of-state is preference power, to be sold to public bodies and non-profit cooperatives. Thus, it is necessary to conclude that the universe of consumers who are legally entitled to receive Niagara power consists, at the most, of those domestic and rural users served by public bodies and non-profit cooperatives.

Certain of the parties have argued that a smaller group of users than the one described immediately above should be counted in developing the entitlements. It has been argued that, in the case of AMP-Ohio, only those residential users served in Cleveland should be considered because AMP-Ohio has not shown that it can receive the power for the benefit of all potential domestic and rural users. It has also been argued that, regarding CMEEC,

only those domestic and rural users served by the three member municipal systems should be counted, and those users served by non-member municipal systems should not, because CMEEC has not shown that the non-member systems would receive power. Vermont has argued strenuously that any discussion of allocations to MMWEC and CMEEC must take into account the existence of a bottleneck in transmission capacity in New York State. Finally, it has been argued that Lansdale has demonstrated no capacity to receive any power that the Commission may allot to it.

Upon consideration, these arguments supply no valid rationale for narrowing the class of consumers to be counted in the entitlement determination. We are not concerned at this point with the factual question of any party's ability to receive power. The very serious factual issues which are raised will be discussed *infra*. We are, conversely, questioning whether, as a matter of law, any domestic and rural consumers served by public bodies and non-profit cooperatives are not legally entitled to power. The NRA provides no support for drawing a line which excludes any of these consumers. Indeed, the NRA's multiple directives that Niagara power be distributed for the benefit of domestic and rural consumers, in a manner which encourages the widest possible use, provides a basis for the conclusion that no rural or domestic user served by a preference body may be excluded from legal entitlement to Niagara power, and thus all such users should be counted. Therefore, an adjustment of Staff's numbers is necessary.

Having determined the nature of the data base, the next step in determining legal entitlement is to cull from the record a figure for each out-of-state entity which represents the total of domestic and rural users served by preference customers in the entity's state. The term "preference customers" refers, of course, to the "public bodies and non-profit cooperatives" who are the distributors of power, and not to membership organizations of preference customers. (*See* Opinion No. 151, *mimeo.* pp. 49-54) For example, CMEEC, MMWEC, AMP-Ohio, and Allegheny are not themselves preference customers, but rather are membership

organizations composed of public bodies and non-profit cooperatives. These latter distributors are the true preference customers.

Legal eligibility to receive Niagara power does not depend on membership in one of these organizations. The focus is not on the number of domestic and rural consumers served by members of MMWEC, for example. Rather, in the case of Massachusetts, the goal is to find in the record a figure which is the number of domestic and rural users served by preference customers in the state, notwithstanding whether they are MMWEC members. Thus, the figure for Massachusetts will include all domestic and rural customers, *i.e.*, residential and small farm classes, served by public bodies and non-profit cooperatives in the state.

In making these determinations it is recognized that a figure which includes all eligible users, in any state, may not be found in the record. For example, the figure used for MMWEC may not include the small farm users or users served by rural cooperative which should be included. However, no other figures were supplied on this record. The parties will be able to demonstrate in future allocation proceedings the number of eligible users to be counted in the entitlement determination. As voiced previously, the only concern here and now is with legal entitlement, and not the factual likelihood of any group of users receiving the power.

First, as to MMWEC, there is no real dispute about the number of domestic and rural consumers to use in the Staff method for the State of Massachusetts. Staff's number, which is 255,361 users, is the total of all residential users served by all municipal systems in Massachusetts, who all happen to be MMWEC members. There is nothing in the record which indicates that there are any eligible users served by cooperative. Thus, no adjustment of the Staff number is necessary.

The determination of what figures to use for CMEEC and AMP-Ohio presents a problem: both are membership organizations consisting of preference customers, but in both cases there are preference customers in the state who are not members. It has been argued that the figure used in the Staff method should only include the consumers served by the member systems of

CMEEC and AMP-Ohio. Based on the determination made above that the data base for legal entitlement will be all rural and domestic consumers served by preference customers, it is clear that that argument must be rejected. There is no basis in the NRA, nor are there any applicable general principles of law, that would justify the failure to include in the calculation of entitlements those consumers served by preference customers who are not members of CMEEC or AMP-Ohio in their respective states. Thus, for the purpose of calculating the legal entitlement of CMEEC and AMP-Ohio, all rural and domestic users served by preference customers in Connecticut and Ohio, respectively, will be counted. Because the record contains no evidence of the number of consumers served by rural cooperatives, Staff's figure for CMEEC which includes all residential users served by Connecticut municipals (47,100 users), and AMP-Ohio's figure, which includes all Ohio residentials served by municipal systems (237,794 users) (Tr. 2918) will be used. [26]

With regard to Vermont, the inclusion in the figure used to calculate its entitlement of virtually all residential consumers in that state is consistent with and required by the finding made here that all rural and domestic consumers served by preference entities should be counted. It was determined earlier in this Decision that the Vermont PSB is a "public body", within the contemplation of the NRA. Thus, the 201,678 consumers who receive the benefits of Niagara power through the vehicle of privately-owned and publicly-owned utilities are properly counted in the figure as customers of a public body.

There is no real dispute as to the numbers to use for Allegheny and Lansdale. Allegheny represents rural cooperatives, *i.e.*, preference customers, who serve 151,147 residential users. Likewise, Lansdale serves 5,856 residential users in its municipal system. Those figures, used by Staff, are therefore, appropriate.

26. AMP-Ohio's witness Murray testified in support of the 237,794 user figure. His figures on Exhibit 160, Schedule 3.0 in this regard, are inconsistent with that positive testimony. As a consequence, no reliance is given to those exhibit figures.

Thus, it is found on the basis of this record, that the out-of-state entities have the following legal entitlements to Niagara power:

Out-of-State Entities	Number of Domestic and Rural Customers	Entitlement Factor (%)
CMEEC	47,100	5.24
MMWEC	255,361	28.41
Vermont	201,678	22.44
AMP-Ohio	237,794	26.45
Allegheny	151,147	16.81
Lansdale	5,856	.65
Total	898,936	100.00%

Utilizing the above adjusted Staff figures and entitlement factors produces the following results:

Out-of-State Entities	Entitlement Factor (%)	Total Power KW	Peaking Power KW	Firm Power KW
CMEEC	5.24	12,995	2,096	9,851
MMWEC	28.41	70,457	11,364	53,411
Vermont	22.44	55,651	8,976	42,187
AMP-Ohio	26.46	65,596	10,580	49,726
Allegheny	16.81	41,689	6,724	31,603
Lansdale	.65	1,612	260	1,222
Total	100.00%	248,000KW	40,000KW	188,000KW

3. The Allocations

As demonstrated by the foregoing discussion, the NRA provides the framework for allocation of Niagara power: it directed the selection of the method of allotment of power adopted above and shaped the data base used in the method by indicating which consumers Congress intended to benefit from Niagara power. However, the inquiry into the issue of what allocations to make to the out-of-state entities does not end at the entitlement determination. Although the dictates of the NRA have been satisfied and a plan for future entitlements established, the factual record developed in this proceeding demands modification of the legal entitlements calculated above. The need for modification derives from several sources. First, to assure that the number of domestic and rural consumers used in the Staff's allocation method has

any meaning on a practical level, it is necessary to determine, on the basis of evidence adduced on the record, that the consumers counted in the figures and for whose benefit the power is allocated can reasonably be anticipated to receive the benefit of power so allocated. And, closely related to the first point, having determined the number of consumers to be counted in the calculation, the record must demonstrate that the users so counted have the physical capability to receive the power allocated to them. Only if both conditions exist will the directives of the NRA, as implemented by the method and data base selected, be carried into being. Thus, absent a showing of facts sufficient to demonstrate that the allocation made to any particular entity will carry out the statutory purposes on which this Decision is based, no power will be allocated for it is not wise to allocate power blindly on the basis of the law with no eye to the facts.

In assessing the evidence of record, it is recognized that those entities who do not yet receive Niagara power carry a heavy burden, particularly in regard to transmission capability. Furthermore, with regard to the present recipients of Niagara power, it is difficult to know what, if any, additional power to which the recipient is legally entitled can actually be transmitted to that party. For example, firm power is power always available except under force majeure situations or under other specified conditions. Firm power requires definite commitments by both the buyer and the seller. Likewise, power sold on a less-than-firm or even completely nonfirm basis due to transmission limitations, may require contractual arrangements. In this regard, then, existing contracts and arrangements become relevant, because unless there is other record evidence, these arrangements are the best and most solid evidence of what amount of power can be transmitted and which consumers will receive it. However, as has already been determined, the contracts in and of themselves, are not binding on the outcome of the present proceeding.

(a) *Lansdale*

As explained above, a preference customer must show the physical capability to receive the Niagara power to which the customer is legally entitled. The record indicates that Lansdale does not have a wheeling (transmission) agreement with Philadelphia Electric Company necessary to receive Niagara power. Nor has Lansdale made a provision to construct 1½ miles of transmission line necessary to facilitate the wheeling of this power. (Tr. 2055-56; 2077-78) Lansdale has failed to sustain its burden of proof on the issue of its capability to receive its entitlement and as a consequence it shall not be allocated any power in this proceeding.

(b) *AMP-Ohio*

AMP-Ohio has failed to demonstrate on the record which consumers will actually receive the benefit of Niagara power and, if power is allocated to AMP-Ohio, how it will be transmitted to those users. AMP-Ohio's witness Murry was unable to substantiate what number of residential customers served by non-investor-owned utilities in Ohio would actually receive the benefit of Niagara power. He revealed that he knew little about the potential residential customers. (Tr. 2777-80) Further, he was unaware whether these utilities had arranged or could arrange for the transmission of Niagara power to the potential residential customers. *(Id.)* If AMP-Ohio received an entitlement based on the number of residential customers served by all municipal systems in Ohio, its entitlement, as shown above, would constitute 26.45 percent of the total out-of-state allocation, or approximately 50 MW of firm power (26.45% times 188 MW) and 11 MW of peaking power (26.45% times 40 MW). Because the record does not show that this amount of power could actually be transmitted, or that the residential users used to derive the entitlement figure would actually receive the power, it is necessary to modify the figure used for AMP-Ohio in arriving at an allocation.

As noted above, the most persuasive and, at least in AMP-Ohio's case, the only evidence of which users will receive Niagara

power is found in existing contracts and arrangements. Thus, it is necessary, on the basis of record evidence, to reduce the figure used to compute its allocation to 39,920 users. This figure reflects the number of domestic users in the City of Cleveland, all of whom are present recipients of Niagara power. The existing contract between PASNY and AMP-Ohio (Exh. 63) provides for sale by PASNY of 19 MW of firm power and 4 MW of peaking power. For purposes of this proceeding, therefore, in the absence of a showing of a capability to receive more power, AMP-Ohio's allocation will be capped at present levels.

(c) *MMWEC and CMEEC*

A serious question has been raised as to the capability of MMWEC and CMEEC to receive Niagara power. The allocation of Niagara power to MMWEC and CMEEC is affected by west to east transmission "bottlenecks" or limitations in the State of New York. These transmission limitations occur when the amount of power transmitted on the lines reaches the capability of the lines. Power cannot be transmitted across any line once its capability is reached. Nonetheless, according to Staff's witness James K. Newton, the lines would be loaded to the limit only about 38 percent of the time, or about 3,356 hours out of 8,760 hours in a year. He stated that the periods during which there would be no limitations (62 percent of the time) appeared adequate to transmit MMWEC's and CMEEC's Niagara power. He did not indicate whether the asserted 62 percent of the time would be a continuous period allowing for even a partial firm power allocation. He believed that MMWEC's and CMEEC's entitlement could be sent on a nonfirm basis rather than firm. (Exh. 184) PASNY witness Philip J. Pelligrino agreed that power could currently be sent across the transmission "bottlenecks" if the power were sent on a nonfirm basis. (Tr. 1681, 1684)

MMWEC stated that it would accept nonfirm power from PASNY in that "it needs the energy wheeled, but it does not need it wheeled on a firm basis, *i.e.*, at every hour of the day."

(MMWEC Initial Br. at 200) CMEEC witness Walter V. Truitt indicated that CMEEC would benefit from the purchase of nonfirm as well as firm power from PASNY. (Tr. 894) By purchasing nonfirm power rather than firm power, the significance of the transmission limitations should be minimal to MMWEC and CMEEC. (Exh. 184, p. 5) Therefore, lacking any evidentiary support for a firm power allocation, MMWEC's and CMEEC's allocation shall only be nonfirm Niagara power.

It is recognized that, notwithstanding the transportation bottlenecks noted above which render uncertain the transmission of any type of power other than nonfirm power, MMWEC and CMEEC may prefer to purchase all or a portion of their legal entitlement in firm power, and receive that power in whatever amount and type which the transmission facilities permit. That type of arrangement would not meet the mandates of the NRA enunciated herein. The purpose of this Decision, and the heart of this case, is the allocation among competing, eligible and needy users of a finite amount of a valuable commodity. The allocation developed and adopted herein demonstrates an effort to allocate, under an appropriate allotment scheme, all legally available power for out-of-state use to all eligible users in amounts and types which the record demonstrates they can receive and use. An allocation of firm power to MMWEC and CMEEC under the capacity limitations disclosed on this record would be a de facto nonfirm allocation: in essence, an allocation on a take-or-pay for and capacity availability basis. Thus, an amount of the most valuable commodity herein allocated, namely firm power, would be denied to other eligible out-of-state users who have demonstrated an ability to receive such power on a firm basis.

(d) *Allegheny*

No dispute has arisen as to the factual question of which consumers will receive power allotted to Allegheny. Thus, Staff's figure of 151,147 will be used. Although Allegheny's present contract with PASNY provides for sale of 86 MW of firm power

and 21 MW of peaking power, it has previously received contractual amounts of 130 MW of firm power and at other time 105 MW of firm and 25 MW of peaking power. (Exh. 98, pp. 6-8; Exhs. 46, 246) Nothing in the record indicates that Allegheny can receive more than 130 MW of power, and thus whatever allocation it receives cannot exceed this maximum capability.

(e) *Vermont*

Vermont's history of receipt of Niagara power, coupled with its method of passing through the benefits to virtually all residential users in the state, provides solid guidance in the determination of that state's allocation. The record demonstrates that the benefits of Niagara power are passed through to some 201,678 residential consumers and its allocation will be based on that figure. (Tr. 2619-20; Tr. 2687-88) Under present arrangements, 40 MW of firm and 10 MW of peaking power is transmitted. In the past Vermont received 50 MW of firm power (Exh. 45) and as a consequence whatever allocation it receives will not exceed that level.

(f) *Firm and peaking power allocations*

Given the facts discussed above, as to (1) the exclusion of Lansdale from receipt of any power, (2) the allocation to MMWEC and CMEEC of nonfirm power only and (3) the residential figures to be used for the allocations to AMP-Ohio, Allegheny and Vermont, the following allotments of firm and peaking of power emerge:

Out-of-State Entities	No of Residential Cust.	Allocation Factor (%)	Peaking Power KW	Firm Power KW
Vermont	201,678	51.35	20,540	96,538
AMP-Ohio	39,920	10.16	4,064	19,101
Allegheny	151,147	38.49	15,396	72,361
Total	392,754	100.00%	40,000KW	188,000KW

Under the allocations immediately above, Vermont would receive 56 MW more firm power and 10 MW more peaking

power than it currently receives. AMP-Ohio (City of Cleveland) would get slightly more than its contract amounts. Lacking any evidence to the contrary, its contract amounts are construed as the delivery limitations due to capacity constraints. In the absence of a showing on the record of a capability to transmit the amounts reflected above, these allocations require further modification.

AMP-Ohio will be allocated no more than its contract entitlement of 19 MW of firm power and 4 MW of peaking power by virtue of the capacity constraints. Similarly, Vermont will not be allocated the 96.5 MW of firm power and 20.5 MW of peaking power reflected in the table above. However, the record does support the conclusion that Vermont is capable of receiving 50 MW of firm power. Because firm power is more valuable than peaking power[27] Vermont will be allocated 50 MW of firm power and no peaking power. This leaves a remainder of 119 MW of firm power which shall be allocated to Allegheny. Since it has demonstrated a capability of receiving 130 MW of firm power, Allegheny shall also be allocated 11 MW of peaking power. The evidence of record supports a conclusion that the allocation of 119 MW of firm power to Allegheny will provide 57 percent of the power necessary for Allegheny to meet the loads of its residential customers.[28] The final allocations of peaking and firm power order herein are, therefore as follows:

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27. For example, Allegheny has commented that it would pay more for purchased power costs because PASNY changed its allocation from 130 MW of firm power to 105 MW of firm power plus 25 MW of peaking power. (Exh. 98, p. 7)

28. Allegheny's residential load is 1,289,063,334 KWH. Since it serves 151,147 residential customers, the load per customer is 8,529 KWH/customer. (Exh. 187) If Allegheny receives 119,000 KW of Niagara firm power, it would receive an associated energy of 740,132,400 KWH. (.71 × 8,760 hours × 119,000 KW). The capacity factor of the Niagara project is 71%. (Exh. 188, p. 8) Thus, the firm power would be 4,897 KWH/customer, or 57% of the residential load

$$\left(\frac{4{,}897}{8{,}529} \times 100\%\right).$$

Out-of-State Entities	Peaking Power (MW)	Firm Power (MW)
Vermont	0	50
AMP-Ohio	4	19
Allegheny	11	119
Total	15MW	188MW

Thus the full 188 MW of firm power has been allocated. Although a legal entitlement exists for the allocation of 40 MW of peaking power, this record reflects, in light of the firm power allocation, a factual ability to absorb only 15 MW of peaking power. The difference between the 15 MW allocated and the 40 MW entitlement will revert to PASNY for distribution in-state in accord with the final outcome of Opinion No. 151. Those out-of-state entities receiving firm and peaking power are placed on notice that in ensuing allocation proceedings, beginning with the 1985 allocations, they may well be denied a portion of the power allocated herein should MMWEC, CMEEC and Lansdale perfect the capacity debilities discussed earlier.

(g) *Nonfirm power allocations*

Consistent with the discussion above, 10 percent of the nonfirm Niagara power will be allocated by the following percentages, assuming all out-of-state entities can receive it. Under adverse water conditions, each out-of-state entity would receive the following allocation (*See* Footnote 17):

Out-of-State Entities	No. of Residential Customers	Allocation Factor (%)	Nonfirm Power (KW)
CMEEC	47,100	6.78	1,356
MMWEC	255,361	36.73	7,346
Vermont	201,678	29.01	5,802
AMP-Ohio	39,920	5.74	1,148
Allegheny	151,147	21.74	4,348
Total	695,206	100.00%	20,000KW

To the extent any of these entities do not require any or all of their respective allocation of nonfirm power, PASNY should

make those amounts available to the remaining out-of-state entities on a pro rata basis.

SUMMARY

In summary, this Initial Decision establishes, among other matters, (1) the methodology and data base to be used in future out-of-state allocations beginning with the 1985 allocations alluded to earlier and (2) interim allocations for the out-of-state entities involved in this proceeding, to take effect immediately and to remain in place until new entitlements and allocations are legally established.

With the findings and conclusions set out above, all issues set for hearing in the Commission's February Order which have actually been litigated are resolved. It is recognized that one of the issues set for hearing, *i.e.*, whether there is a possible linkage between allocations of St. Lawerence power and the allocations of Niagara power made here, has not been addressed. The absence of attention to this issue is based in the parties failure to produce evidence on the record related to this issue; some parties have addressed this issue only to the extent of making a passing reference on brief to the fact that Vermont presently receives the bulk of the St. Lawerence power sold outside of the State of New York, and thus has a lesser claim to Niagara power. The argument has been duly noted, but no party has demonstrated the need to address that issue at this time. As attested to by Staff's witness Biggerstaff, (Exh. 186, p. 11) that issue should more properly be addressed when PASNY makes its allocation of both Niagara and St. Lawerence power in 1985.

ORDER

WHEREFORE, It is ordered, subject to review of the Commission on appeal, or upon its own motion that PASNY shall, in compliance with the terms of its license and the Niagara Redevelopment Act, make available within 60 days of this order, project power to the out-of-state entities in the amount set forth herein under subsections 3(f) Firm and peaking power allocations and

3(g) Nonfirm power allocations. Within the same period PASNY shall tender contracts to the out-of-state entities with terms and conditions consistent with the allocations herein ordered.

GEORGE P. LEWNES
Presiding Administrative Law Judge

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE'S BRIEF IN OPPOSITION

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RESPONDENT MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE'S BRIEF IN OPPOSITION

The Municipal Electric Utilities Association of New York State ("MEUA"), an intervenor-respondent below, submits this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Petition") submitted by the Metropolitan Transportation Authority ("MTA"). For purposes of this Brief in Opposition, MEUA accepts the following sections submitted by MTA in its Petition: Questions Presented, the Statement Pursuant to Supreme Court Rules 21 and 28.1,

Opinions Below, Jurisdiction, and Statutory Provision Involved. MEUA adopts the Statement of the Case included in the Background statement in the opinion below. *See* Petition at A-4-A-11. MEUA objects to the use of extra-record facts and facts without a record citation in the Statement of the Case presented by MTA.

SUMMARY OF ARGUMENT

This Court should not grant the Petition for a Writ of Certiorari filed by MTA for the following reasons. First, MTA has presented no issue of major national importance. Second, MTA has not presented an issue concerning which there is any conflict with any court or agency. Third, MTA has not presented an issue with any Constitutional implications. Fourth, the court below resolved the issue correctly in a well-reasoned and thorough opinion. Fifth, this Court should not be required to make the type of *de novo* factual findings which MTA deems necessary for an overturning of the decision below. Sixth, the issue which MTA asks this Court to resolve is applicable only to a single entity: MTA. In short, this Court should not spend its valuable resources in resolving a single issue relating to a single law with applicability to a single entity which has no Constitutional implications and involves no conflict between or among courts.

REASONS THE PETITION SHOULD BE DENIED

The MTA proposed that this Court review the decision in *Metropolitan Transportation Authority v. Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986) because of the effect of that decision on a single entity—the MTA. It seeks to have this

Court make major *de novo* findings of fact in order to overturn the decision below. Finally, MTA seeks to have this Court modify the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.*, by applying the principles of subsequent statutes[1] which do not mention the Niagara Redevelopment Act in their terms or their legislative history.

MTA poses four arguments in support of review by this Court. None of these arguments indicates that the issues raised are of such importance to encourage this Court to use its limited time in reviewing the decision below. Rather, all the arguments indicate that MTA is a single disappointed litigant, which seeks review solely to overcome an adverse decision below.[2]

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[1] MTA argues that the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, the Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. § 1601 *et seq.*, and the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.*, should be used to determine Congressional intent in an Act which predated those statutes. Although the three statutes do express a general Congressional intent, they do not alter the meaning of all statutes which preceded them.

[2] This Court should deny the Petition for a Writ of Certiorari filed by MTA on the basis that it seeks review of a single issue affecting a single law and a single party. As this Court has stated:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387, 393 (1923). MEUA notes that one other party below, Al-

First, MTA argues that the Niagara Project is a valuable resource and that the decision below has a substantial economic impact. Rather than focusing on the economic impact on itself—the only entity which would be affected if this Court acted upon the issues presented—MTA focuses on the economic impact on the entire Niagara Project. The impact on MTA itself is closer to the $6,200,000 impact cited in its Petition at 8, than to the hundreds of millions of dollars cited in its Petition at 7. The actual impact on MTA translates to an effect on MTA riders of approximately 3 mills—or less than one-third of a cent—per ride. *See* Tr. 639, R. 639. These amounts do not constitute such enormous sums that they, by themselves, would justify this Court's intervention.

Second, MTA argues that this case is one of first impression regarding the preference provision in the Niagara Redevelopment Act. MTA seeks such a narrow review of that preference provision that this Court would be required to review the preference provision a second time as to its applicability to any entity other than a single end-user. MTA is not even able to state unequivocally that any other end-user would be affected. Rather, it hypothesizes that another end-user somewhere "may" be affected by the

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legheny Electric Power Cooperative, Inc., has filed a Petition for a Writ of Certiorari and two parties below, Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities have filed a Cross-Petition for a Writ of Certiorari. Although additional entities have an interest in issues in this proceeding which are different from the issue raised by MTA, MTA's Petition merely seeks review of a single issue affecting a single law and a single party.

decision below.[3] Such piecemeal review of a statutory provision is contrary to the policy of conserving this Court's resources.

Third, MTA appears to be claiming that this Court should grant Certiorari because the court below was wrong. MTA, like any party which has lost in the court below, naturally seeks to overturn the ruling. Even if the MTA were correct in its allegation of a mistaken decision below—which it is not—this Court should not grant Certiorari merely to reverse an error.[4]

In fact, MTA appears to ask this Court to make *de novo* factual findings in order to reverse the decision below. It asks this court, first, to speculate whether the Power Authority of the State of New York would, if granted the discretion to distribute preference power to a broad range of entities, act in such a way as to prevent dilution of such power. It seeks a *de novo* decision by this Court that "yardstick competition" is obsolete and asks this Court to determine what Congress would have done had "yardstick competition" been obsolete during passage of the Niagara Redevelopment Act. Additionally, it asks

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[3] Similarly, it hypothesizes that this Court would grant a Writ of Certiorari if there were a conflict between the Circiuts. Petition at 10. Because there is no such conflict, this Court should not act as if there were such a conflict.

[4] MEUA disagrees with every argument made by MTA in its Petition. The court below, in a thorough and well-reasoned decision, properly held that MTA is not a "public body" pursuant to the Niagara Redevelopment Act. Because this case is so obviously inappropriate for this Court's review, MEUA will not burden this Court with arguments in opposition to MTA's argument on the merits.

this Court for a *de novo* determination of whether the goal of "yardstick competition" is aided by the allocation of preference power to MTA. Such factual findings are appropriately made by the court or agency of original impression, not by the highest Court in the land. *See Anderson v. Bessemer City*, 470 U.S. ___, 84 L.Ed.2d 518, 528 (1985); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); Rule 52(a), Fed. R. Civ. P. MTA's request that this Court make such factual findings in order to overturn the court below underscores the inappropriateness of MTA's petition.

MTA finally argues that the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, the Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. § 1601 *et seq.*, and the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.* somehow transmogrified the definition of "public bodies" in the Niagara Redevelopment Act. This Court has consistently held that repeals by implication are not favored and that a later general statute cannot by implication modify an earlier specific statute except under limited circumstances not present here.[5] *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Fourco Glass Co. v. Transmirra Products Corporation*, 353 U.S. 222, 228-29 (1957); *Rodgers v. United States*, 185 U.S. 83, 86-89 (1902). Similarly, this Court should not hold that enactment

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[5] Those limited circumstances are where provisions in the two acts are in irreconcilable conflict and where the later act covers the entire subject matter of the first act and is clearly intended as a substitute. *See* Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

of general laws can totally rewrite prior laws in order to give them a meaning not intended by their authors.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari. It involves a question which definitely applies to merely one entity and therefore lacks the national impact necessary for this Court's review. It does not involve a massive amount of money as related to that single entity. It does not involve a Constitutional question. It does not involve a conflict of legal interpretation between any courts. In short, the Petition seeks a determination by this Court of a single issue in a single law which applies to a single entity. This Court should not spend its valuable time on such a limited case.

Respectfully submitted,

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No. 86-736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 22, 1986

QUESTION PRESENTED

Whether a public entity that (1) does not own, control or operate an electric utility distribution system and (2) is not capable of providing "yardstick competition" to investor-owned utilities is a "public body" under Section 836(b)(1) of the Niagara Redevelopment Act ("NRA"), 16 U.S.C. § 836(b)(1).

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") is a public corporation and political subdivision of the Commonwealth of Massachusetts, created pursuant to Mass. Statutes 1975, Chapter 775.

The Connecticut Municipal Electric Energy Cooperative ("CMEEC") is a public corporation and political subdivision of the State of Connecticut, created pursuant to Title 7, Chapter 101a of the General Statutes of Connecticut (1975).

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INTRODUCTION

This brief is filed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenors in the proceedings below and respondents before this Court, in opposition to the petition of the Metropolitan Transportation Authority ("MTA") for a writ of certiorari. MMWEC and CMEEC represent the interests of entities which have been found to be NRA "public bodies," and are currently receiving allocations of Niagara Project "preference power."[1] NRA

[1]CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power supply agencies for municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants."

Section 835(b)(1), the NRA "preference provision," states in pertinent part that in disposing of 50 percent of the output of the Niagara Project the Power Authority of the State of New York ("PASNY"), the Project licensee, "shall give preference and priority to public bodies and nonprofit cooperatives. . . ."

MTA seeks review of that portion of the judgment of the United States Court of Appeals for the Second Circuit in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986) (Petition Appendix at A1-A20) which held, affirming the determination of the Federal Energy Regulatory Commission ("FERC"), that only public entities which are capable of selling and distributing power directly to consumers at retail are NRA "public bodies" and qualify for the purchase of NRA preference power. On the basis of this finding, the Commission held that MTA, which is a power consumer and not a retail distributor, was not qualified to purchase NRA preference power.[2] The Second Circuit affirmed the Commission's determination.

MMWEC and CMEEC contend that the petition should be denied. As will be shown below, MTA has not demonstrated any special or important reason for the exercise of the Court's discretion as required under S.Ct. Rule 17.1.[3]

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[2]MTA is of course eligible to purchase power from the half of the Project's output which is not subject to the federal preference provision. Opinion No. 229, 30 FERC ¶61,323 at A67.

[3]MMWEC and CMEEC will not offer a counter to MTA's "Statement Of The Case." However, MMWEC and CMEEC would note that MTA's "Statement," and indeed much of its petition, contain assertions which are in two respects inappropriate. MTA relies, in its Statement and elsewhere, on assertions which are not supported by facts, let alone facts contained in the record in this proceeding. *See, e.g.*, MTA's bald claims as to the size of its "annual electric bill" (Petition at 3), as to the alleged "*immediate* cause and effect impact" between a denial of preference power and pollution due to increased energy consumption (Petition at 22, emphasis in original), and as to the "desirability" on the part of electric utilities to attract new loads (Petition at 17).

MTA's Statement also contains a mischaracterization of a decision of the Federal Power Commission. MTA erroneously argues (Petition

REASONS FOR NOT GRANTING THE WRIT

MTA contends (Petition at 6) that there are "at least four reasons" why a writ of certiorari should be issued. Two of the reasons are "policy-oriented," relating to the potential impact of the decision on Niagara Project allocations as well as other federal project preference sales. MTA claims (Petition at 7) that certiorari should be granted because the decision below may cause "irreparable injury to other government agencies" and may someday result in a conflict between the circuits (Petition at 9). Neither reason supports Supreme Court review of this case because neither is accurate.

The other two reasons relate to the specifics of the Second Circuit's analysis. MTA alleges that the court improperly ignored the "plain meaning" of the NRA, erroneously used (and interpreted) NRA legislative history, and failed to consider certain environmental statutes in reaching its decision. MMWEC and CMEEC will briefly address and refute these erroneous attacks on the Second Circuit's decision.

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SECOND CIRCUIT AND THOSE OF OTHER COURTS OR FEDERAL AGENCIES, AND NO EVIDENCE THAT THE SECOND CIRCUIT'S OPINION WILL RESULT IN "IREPARABLE INJURY" TO OTHER GOVERNMENT AGENCIES

MTA's petition is founded on possibilities and fears rather than on facts. MTA admits (Petition at 9-10) that at present there is no conflict between the Second Circuit's definition of the NRA phrase "public bodies" and the way in

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at 4) that the FPC in *State of Vermont Public Service Board* v. *PASNY*, 55 FPC 1109 (1976), "had given the term 'public bodies' its plain meaning interpretation." In fact, as explained in the portion of FERC Opinion No. 229-A cited by MTA (Petition at 4, citing A28), the FPC in the *State of Vermont* decision interpreted the phrase "public bodies" not simply in accordance with its "plain meaning," but in a way "that was deemed to achieve the purpose of the NRA."

which that term is defined elsewhere. MTA cannot cite so much as a single example of a governmental agency which would suffer any harm, let alone "irreparable injury," if the Second Circuit's determination is upheld. However, MTA contends that certiorari should be granted because: (1) the Second Circuit's allegedly erroneous determination will undoubtedly lead to a conflict at some time in the near future; (2) the issue is one of "first impression;" and (3) pending such a conflict qualified government agencies will likely be denied allocations of federal preference power available under either the NRA or other federal preference laws.

These purported justifications are without merit. This Court need not address a situation where it is conceded that no conflict of any kind, let alone one meriting Supreme Court resolution, is present. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). More importantly, there is little likelihood that there will ever be such a conflict. The decision of the Second Circuit is based upon a proper analysis of the language of the NRA, its extensive legislative history, and interpretations of other federal preference laws. 796 F.2d at 591-593, A11-A16. It is therefore far more likely that the Second Circuit's position will be affirmed rather than rejected in the unlikely event that another circuit is called upon to address this issue.

Moreover, contrary to MTA's assertions, the definition of the term NRA "public bodies," while resolved for the first time by a circuit court in this case, should in fact not be considered an issue of "first impression." The Second Circuit analyzed in detail the meaning of the NRA preference provision in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984). While that case did not decide the specific issue faced here, the Second Circuit's analysis in *PASNY*, including an examination of the "agonizingly long" legislative history of the NRA, 743 F.2d at 104, was used by the court in deciding *MTA* v. *FERC*, 796 F.2d at 591-593, A12-A16. In addition, the FERC addressed this issue in both Opinion Nos. 151, 21 FERC ¶61,021 (October 13, 1982), and 151-A, 23 FERC ¶61,031 (April 6, 1983), which were affirmed in *PASNY* v. *FERC*, and Opinion Nos. 229 and 229-A, 30 FERC ¶61,323

(March 27, 1985) and 32 FERC ¶61,194 (July 30, 1985) (Petition Appendix at A23-A85), affirmed in *MTA* v. *FERC*.

Finally, MTA's fears of "irreparable injury" to other government agencies if this decision is not reviewed are unsupported by either facts or law. MTA has offered no instance (outside of itself) where a non-distributor government agency has been or will likely be deprived by the Second Circuit's ruling of power made available pursuant to a federal-type preference clause. More importantly, the court in *MTA* v. *FERC* neither considered nor decided the general legal question raised here by MTA: whether government agencies which consume rather than resell power are eligible to purchase preference power sold pursuant to the terms of federal preference laws. The court resolved only the narrow issue of the meaning of the phrase "public bodies" in the NRA preference clause. It did not determine the result under different statutory provisions contained in the various federal preference laws.[4]

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[4]MTA also asserts (Petition at 8) that the "economic impact" of the Second Circuit's decision is an "important factor" in deciding the fate of MTA's request. While MMWEC and CMEEC do not dispute that the case involves the allocation of a valuable resource, this Court should of course not act where, as here, there has been no demonstration that an error has been made. Moreover, MMWEC and CMEEC would note that the two cases cited by MTA (Petition at 8) in support of the claimed importance of "economic impact" in determining whether to grant the petition do not address this contention. The Court stated in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 n.2 (1947), that its acceptance of the case was in part motivated by the presence of numerous similar cases then pending; in *General Motors* v. *District of Columbia*, 380 U.S. 553, 556-57 (1965), which involved review of the District's foreign corporation tax, the Court noted that certiorari was granted because of the feared impact on interstate commerce if the District tax formula was adopted elsewhere, and the view that the District's action involved "statutorily unsupported exertions of administrative power."

II. THE SECOND CIRCUIT HAS CORRECTLY INTERPRETED THE NRA, AND ONLY CONGRESS, NOT THIS COURT, CAN RESOLVE MTA'S CONCERNS

MTA attacks the Second Circuit's analysis of the NRA on the ground that the court improperly ignored the "plain meaning" of the NRA and relied instead upon the intent of the statutory language as expressed in its legislative history. The opinion below fully considers and properly rejects MTA's arguments. MTA has alleged no basis to support revisiting its concerns here.[5]

In addition, MTA contends that even if the Second Circuit is correct that Congress's intent in enacting the NRA preference clause was to promote "yardstick competition," this Court — and not the United States Congress — should interpret away clearly expressed legislative intent. In MTA's view (Petition at 17-18), "'yardstick competition' makes little sense in today's energy market," and this Court should therefore reevaluate the concept in light of MTA's perception of the choice which Congress would make today concerning the allocation of NRA preference power.

MTA is wrong both in proposing that the Court undertake this analysis and in presuming its likely result. It is the exclusive province of Congress, and not this Court, to amend or repeal the NRA. *FPC* v. *Texaco*, 417 U.S. 380, 400 (1974). The Second Circuit correctly found, 796 F.2d at 593, A15, that it had no right to "second guess" Congress's determination,

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[5] Included among MTA's arguments is the claim that the decision does not comport with several environmental laws. The basis for this assertion is the unsupported statement that the loss of preference power (with its *de minimis* impact upon MTA's per ride costs) will have an immediate and significant impact upon the pollution level in New York City. Moreover, MTA's reliance (Petition at 22-23) upon *Forelaws on Board* v. *Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied* _____ U.S. _____, 106 S.Ct. 3293 (1986), is misplaced because that case concerned an agency's environmental obligation when entering into long-term power supply contracts. The action challenged here concerns FERC's interpretation of the statutory eligibility requirements for the purchase of preference power, not the actual allocation of power to qualified entities.

and the cases cited by MTA (Petition at 18), carefully read, do not support the proposition that Congress's will, when known, can be ignored and overridden by judicial "legislation." Moreover, the available evidence, which was presented to the Second Circuit, indicates that Congress continues to believe in the viability of the "yardstick competition" concept. *See* Water Resources Development Act of 1983, Senate Report No. 98-340, 98th Cong., 1st Sess. 53 (1983).

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the Second Circuit Court of Appeals.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the phrase "neighboring States" in the Niagara Redevelopment Act (NRA), 16 U.S.C. 836, refers solely to Pennsylvania and Ohio or instead refers to all states within "reasonable economic transmission distance" from the Niagara Power Project.

2. Whether Congress, in giving "public bodies" preference status for hydroelectric power under the NRA, intended to limit the preference to publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-28a)[1] is reported at 796 F.2d 584. The March 27, 1985, opinion of the Federal Energy Regulatory Commission (the Commission) (Pet. App. 58a-102a) is reported at 30 F.E.R.C. ¶ 61,323 (1985). The Commission's July 30, 1985, opinion on rehearing (Pet. App. 29a-57a) is reported at 32 F.E.R.C. ¶ 61,194 (1985).

[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-735.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1986. A petition for rehearing was denied on August 6, 1986 (Pet. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Niagara Redevelopment Act (the NRA), 16 U.S.C. 836 *et seq.*, the Commission issued a license to the Power Authority of the State of New York (PASNY) to construct and operate a power project—the Niagara Power Project (the Project)—utilizing the United States' share of water from the Niagara River. One of PASNY's principal functions is to allocate hydroelectric power generated by the Project. Pet. App. 9a. Under the NRA, PASNY, "in disposing of 50 per centum of the project power," is required to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" (16 U.S.C. 836(b)(1)). Furthermore, in allocating such power, PASNY is required to make a reasonable portion thereof—up to 20 percent (*i.e.*, 10 percent of the Project's total power)—"available for use within reasonable economic transmission distance in neighboring States" (16 U.S.C. 836(b)(2)).

2. The present litigation began in March 1980 when municipal companies in Massachusetts and Connecticut filed complaints with the Commission charging that PASNY had deprived them of their share of the preference power set aside for "neighboring States" under 16 U.S.C. 836(b)(2). In its answer, PASNY acknowledged that Massachusetts and Connecticut qualified as "neighboring States." PASNY indicated, however, that its decision not to sell preference power to those municipalities was permissible because it was already selling a "reasonable" portion of such power to customers outside of New York. PASNY further indicated that the Metropolitan Transportation Authority (MTA),

which is in charge of most mass transit in New York City, was purchasing a portion of the preference power that otherwise would have been sold out-of-state. The Commission consolidated the complaints and it permitted various entities, including the Vermont Department of Public Service (VDPS) and Allegheny Electric Co-operative, Inc. (Allegheny), to intervene in the proceedings. Allegheny's construction, as intervenor, was that "neighboring States" was intended to refer to Ohio and Pennsylvania. In February 1981, the Commission held that Massachusetts and Connecticut, not just Pennsylvania and Ohio, qualified as neighboring states. In addition, the Commission ordered an evidentiary hearing concerning the proper allocation of preference power among the neighboring states. Pet. App. 10a-13a.

On March 27, 1985, after the Administrative Law Judge (ALJ) had completed extensive hearings and had rendered a decision, the Commission entered an order affirming the ALJ in most respects (Pet. App. 15a, 58a-102a). The Commission held that neither the MTA nor the VDPS qualified for preference power because neither was a "public body" (*id.* at 75a-82a). According to the Commission, the term "public bodies" in the NRA means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" (*id.* at 80a). Under that definition, MTA failed to qualify because it merely consumed power and did not distribute it; VDPS did not qualify because it did not distribute power itself but simply acted as a wholesale broker to private utilities and municipal systems (*id.* at 80a-82a).[2]

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[2]In reaching its decision with respect to VDPS, the Commission overruled, in relevant part, its prior decision in *Vermont Pub. Serv. Bd.* v. *Power Authority*, 55 F.P.C. 1109 (1976).

On the question of "neighboring States," the Commission reaffirmed its prior ruling that the phrase "neighboring States" was not limited to Pennsylvania and Ohio (Pet. App. 72a-75a). In the Commission's view (*id.* at 73a), "[b]y interpreting 'neighboring states' according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis." While the Commission acknowledged that there were several references in the legislative history to Pennsylvania and Ohio, it noted that other states in the region were mentioned as well (*id.* at 74a).

On July 30, 1985, the Commission issued an order on rehearing affirming its March 27, 1985, opinion (Pet. App. 29a-57a).

3. The court of appeals affirmed (Pet. App. 3a-28a). In construing the phrase "public bodies," the court concluded—based on a survey of the legislative history—that Congress enacted the NRA's preference provisions so that municipalities would utilize their supply of hydropower "to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 19a-20a). The court reasoned (*id.* at 20a) that such "[y]ardstick competition" could only be effective if the municipal competitor, like the private utility, actually resold electricity to ultimate consumers. If the public entity used the power itself or sold it to private utilities, the private utilities would face no pressure to reduce the prices they charged their customers (*ibid.*). Applying that interpretation of "public bodies," the court agreed with the Commission that neither MTA nor VDPS was eligible for preference power.[3]

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[3]The court (Pet. App. 23a-24a n.8) also rejected MTA's contentions that the Commission ignored mass transit considerations and violated the environmental laws by not classifying MTA as a preference customer. It noted (*id.* at 24a n.8) that the NRA does not require the

On the meaning of the phrase "neighboring States" under the NRA, the court concluded that there was "no evidence" that Congress intended that phrase "to have any meaning other than its literal one: states found to be within reasonable geographical proximity of New York, taking into account all relevant factors and whether they are within reasonable economic transmission distance" (Pet. App. 24a). The court reviewed the legislative history of the "neighboring States" provision and concluded that, in Congress's view, "economic transmission distances were mutable" (*id.* at 25a). The court noted (*ibid.*) that no congressman had suggested during the debates that preference power "should always be available only to those limited areas which happened to be within economic transmission distance in 1957 [when the NRA was enacted]." The court further cited statements by several congressmen that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance (*ibid.*). Thus, reasoned the court, since Massachusetts and Connecticut were "within reasonable geographical proximity of New York," the public bodies within those states qualified for preference power (*id.* at 24a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

Commission "to ignore yardstick competition in favor of subsidizing mass transit * * *." In addition, it noted (*ibid.* (citation omitted)) that, on the environmental question, "Congress' intent controls [and in any event] if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment."

1. Petitioner Allegheny contends (86-735 Pet. 5-29) that the court of appeals and the Commission erred in holding that the phrase "neighboring States" under the NRA's preference provisions includes Massachusetts and Connecticut. According to Allegheny (*ibid.*), only the States of Pennsylvania and Ohio are encompassed within that phrase.

In the first place, Allegheny's interpretation is contrary to the plain language of the statute. Had Congress intended to designate Pennsylvania and Ohio as the exclusive out-of-state recipients of preference power, it could have—and presumably would have—done so.[4]

Moreover, the legislative history does not support Allegheny's position. As the court of appeals indicated (Pet. App. 25a), while Congress acknowledged that for a period of time only customers in western Pennsylvania and northeastern Ohio would receive preference power, no congressman stated that such power should always be available only to those limited areas. To the contrary, as the court noted (*ibid.*), members of Congress acknowledged that economic transmission distances were mutable.[5]

In sum, both the language and history of the NRA support the interpretation of "neighboring States" adopted by the Commission and the court of appeals.

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[4]As the Commission noted by way of contrast (Pet. App. 73a n.6), Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. 617d(c), explicitly specifies a preference for the States of Arizona, California, and Nevada.

[5]Allegheny's claim (Pet. 6) that the court of appeals "fail[ed] * * * to examine or analyze the legislative history presented to it" is patently without merit. As its opinion demonstrates (Pet. App. 24a-26a), the court conducted a thorough examination of the legislative history.

2. Petitioner MTA (86-736 Pet. 11-19) and cross-petitioners (86-942 Cross-Pet. 8-29) assert that the Commission and the court of appeals erred in restricting the phrase "public bodies" to those publicly owned entities that sell and distribute power to ultimate consumers. The court of appeals, however, found that the legislative history convincingly demonstrated that Congress intended the words "public bodies" to refer not to governmental units generally but to public entities that sell and distribute power at retail. As the court pointed out (Pet. App. 20a-21a), the term "public body" was treated in the legislative history as being synonymous with such terms as "municipal utility" or "municipal plant." Moreover, throughout the congressional debates it was implicit that "public bodies" were public entities capable of distributing power (*id.* at 21a). In addition, Congress's purpose in adopting the preference provisions was to promote "[y]ardstick competition." As the court pointed out (*id.* at 19a-20a), such competition would not exist if the public entity used the preference power itself or simply resold it to privately owned utilities. Since the more expansive interpretation of "public bodies" urged by petitioner MTA and the cross-petitioners would contravene Congress's intent, the Commission and the court of appeals properly rejected it.[6]

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[6]MTA errs in asserting (86-736 Pet. 16-17) that the economic pressure of yardstick competition "is of no value today" and that such competition therefore should not have been relied upon by the court of appeals in construing the statute. Such an argument is properly addressed to Congress, not the courts. There is likewise no merit to MTA's argument that the Commission improperly ignored mass transit and environmental considerations. As the court of appeals recognized (Pet. App. 23a-24a n.8), the NRA does not require the Commission "to ignore yardstick competition in favor of subsidizing mass transit" or to classify MTA as a public body in order to promote environmental interests.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

RHODE ISLAND PUBLIC UTILITIES COMMISSION,
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

The New Jersey Preference Boroughs[1], an intervenor-respondent below, submits this Brief in Opposition to Petitions and Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit by Petitioner Allegheny Electric Cooperative, Petitioner Metropolitan Transportation Authority, and Cross-Petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities. All three Petitions seek review of various portions of the Second Circuit's decision in *Metropolitan Transportation Authority v. Federal Energy Regulatory Commission,* 796 F.2d 584 (2d Cir. 1986), affirming two opinions issued by the Federal Energy Regulatory Commission, Opinion Nos. 229 and 229-A, 30 FERC(CCH) ¶ 61,323, 32 FERC (CCH) ¶ 61,194. These Opinions interpreted certain provisions of the Niagara Redevelopment Act, 16 U.S.C. §§ 836(b)(1), (2). The common thread running through the Petitions and the Cross-Petition is that the Second Circuit improperly relied upon some or all of the legislative history. The New Jersey Preference Boroughs respectfully suggest to the Court that none of the Petitions or the Cross-Petition present substantive or procedural reasons why this Court should grant the Petitioner's Writs of Certiorari.[2]

---

[1] The New Jersey Preference Boroughs consists of the following municipal electric systems in the State of New Jersey: Butler, Lavallette, Madison, Milltown, Park Ridge, Pemberton, South River, Seaside Heights.

[2] For purposes of this Brief, the New Jersey Preference Boroughs adopt the questions presented in each Petition, and the Statement of the Case presented in Allegheny's Petition.

REASONS FOR NOT GRANTING THE WRIT

Allegheny Electric Cooperative, Inc. seeks to have this Court reverse the conclusion of the Second Circuit that the term "neighboring States," 16 U.S.C. § 836(b)(2), should include all states within "reasonable geographic proximity of New York . . . within economic transmission distance." 796 F.2d at 594, at 24a. Allegheny contends that the Second Circuit gave the term a "literal meaning" and consequently failed to fully examine the legislative history which would have resulted in a narrower meaning. Allegheny contends that Pennsylvania and Ohio are the only "neighboring states" entitled to the power made available under section 836(b)(2). The Second Circuit did not "completely ignore" (Petition at 5-6) the legislative history of this term; in fact, the Second Circuit examined the legislative history in detail and reached a conclusion different from Allegheny. 796 F.2d at 594-95, at 24a-26a.

The Metropolitan Transportation Authority seeks to have this Court reverse the conclusion reached by the Federal Energy Regulatory Commission and affirmed by the Second Circuit that "public bodies" under the Niagara Redevelopment Act must be "capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, 23a. The MTA does not sell or distribute electricity. Nevertheless, it asserts that a governmental consumer is a "public body" under the Act and therefore, eligible to participate in the allocation of preference power. The MTA contends that the meaning of the term "public bodies" is so clear and unambiguous that it is unnecessary and inappropriate even to look to the legislative history of the Act. This argument, and several

other public policy arguments more appropriately addressed to Congress, were dismissed by the Second Circuit. 796 F.2d at 593-94 n. 8, 23a-24a n. 8.

The Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities seek to have this Court accept certiorari on the "public bodies" issue presented by the MTA, and to accept a new issue which they call the "state access issue." Reduced to its simplest terms, the Cross-Petitioners are asking the Court to construe the term so as to include a state agency acting as the "bargaining agent" within the class of "public bodies" eligible for preference power even though the state agency has no means of directly selling and distributing power to consumers at retail. Without so stating, the Cross-Petitioners are asking the Court to reverse the Second Circuit's affirmation of the FERC's Opinion that the Vermont Department of Public Service, as constituted prior to 1986, was not a public body "entitled to purchase preference power from PASNY." 796 F.2d at 593 (footnote omitted), 23a.

In support of its position, the Cross-Petitioners complain that the FERC and the Second Circuit should give the term "public bodies" its plain or literal meaning without reference to the legislative history. In support of this proposition the Cross-Petitioners selectively cite portions of this Court's decisions that teach us that statutory construction questions *begin* with the language of the statute itself (Petition at 13-14). Cross-Petitioners conveniently fail to cite to equally relevant cases that state that studying the legislative history is an entirely appropriate and important task in construing a statute. This Court has said:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass v. United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col.L.Rev. 1299 (1975). *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).

Ironically, after urging that the Second Circuit erred by relying on the legislative history to construe the term, the Cross-Petitioners then proceed to cite partial legislative histories of several federal preference-type acts and selectively delve into the legislative history of the Niagara Redevelopment Act to support its contention that a state agency that is not a seller and distributor of electricity to consumers at retail should be a Niagara Redevelopment Act "public body."

The Cross-Petitioners also argue that certiorari is appropriate because, "By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court's rulings," (Petition at 21), citing *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). Cross-Petitioners' reliance on these cases is misplaced. The FERC did not read *PASNY v. FERC*,

743 F.2d. 93 (2d Cir. 1984) incorrectly, and *PASNY* certainly did not involve the question of deference to an administrative agency.

In summary, the three Petitions ask this Court for another opportunity to argue their case but all three fail to provide compelling reasons for granting writs of certiorari. None of the Petitions can show a conflict between circuits or between state and federal courts over the Niagara Redevelopment Act; none present convincing arguments that the Second Circuit departed from the accepted course of judicial proceedings or failed to follow the rules for statutory construction; none persuasively argue that a federal question has been construed in conflict with applicable decisions of this Court. In summary, the Petitioners and Cross-Petitioners fail to meet any of the threshold criteria outlined in Rule 17.1 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitions and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petitioner,

-v.-

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

ARGUMENT

Four customer groups and FERC have filed briefs in opposition to the MTA's Petition for Certiorari.[1] Vitally interested in retaining the preference power themselves, these groups attempt to have this Court deny the petition by suggesting that this case involves nothing more than "a single disappointed litigant." *See,* MEUA Br. p. 3; *see also* MMWEC/CMECC Br. p. 4. But there is more at stake than the entrenched preference customers would have one believe. This is the first interpretation of the phrase "public bodies" under the NRA. The final determination will affect not only in-state and out-of-state governmental agencies otherwise eligible to receive Niagara Power, but also the distribution of hydropower under other federal preference legislation.

1. The customer groups are the Municipal Electric Utilities Association of New York State ("MEUA"), Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative ("MMWEC/CMEEC"), and New Jersey Preference Boroughs ("NJ").

The far-reaching impact of this determination requires a decision by this Court. Absent such direction, uncorrectible misallocations of a most valuable asset will continue, and a demonstrably erroneous decision with vast economic and negative environmental impact will be used as a guideline for allocations.

We will first respond to the "procedural" arguments the parties rely upon in opposing MTA's Petition, and then very briefly address only a few of the most egregious statements in connection with the merits of the Second Circuit's determination.

(1) **The amounts involved.** MEUA argues that since the "loss" to the MTA may be *only* $6 million annually, the stakes involved in this case are not sufficiently large to justify the intervention of this Court. MEUA Br. p. 4.[2] But the Niagara project produces over 14.6 billion kilowatt hours of energy; and the savings, by reason of the cost differential between hydropower and conventional power, amount to over a quarter of a billion dollars annually. MTA Pet. p. 8.[3] No party in opposition has cited any support for the claim that certiorari should be granted only if the petitioner by itself has a large enough stake to support the review. Rather, the overall economic impact is what should be considered, and the effect here is more than enough to make this a significant case for review.

(2) **The number of agencies involved.** Three of the opposing parties claim that there is no other governmental agency which would be affected by this Court's review of the Second Circuit's determination. MMWEC/CMEEC Br. pp. 4-5; MEUA Br. pp. 2-4. They are not only mistaken, but also less than candid.

2. MMWEC and CMEEC admit that this case involves the allocation of a valuable resource (MMWEC/CMEEC Br. p. 5, n. 4), but go on to attempt to distinguish other cases in which "economic impact" was an element considered in granting certiorari, by saying that in those cases there were other elements which, in part, motivated the Court to grant the writ. There are always multiple elements which together make a case worthwhile for review. Those elements exist here, too; and the economic impact of the decision is one such element.

3. No question has been raised as to the amount of power or total savings involved.

While this very case was before FERC with all these parties actively participating, the Niagara Frontier Transportation Authority ("NFTA"), which operates a mass transportation system in Erie and Niagara counties, moved to intervene out-of-time.[4] FERC denied NFTA's motion because it believed that NFTA's interest was already represented by the MTA in this proceeding.[5] More importantly, in New York State alone, some of the public agencies which the Power Authority is permitted to serve (for just one example, the New York City Housing Authority) also may be adversely affected by the determination below. *See,* N.Y. Pub. Auth. L. § 1005. MTA does not have the information as to government agencies in Massachusetts, Connecticut, New Jersey, and elsewhere that may qualify as public bodies and receive Niagara hydropower, but governmental agencies like the MTA and NFTA surely exist in those States and throughout the country. In sum, the number of governmental agencies affected is much greater than the opposing parties would have the Court believe.

(3) **The lack of conflict among the circuits.** Both MMWEC/CMEEC and MEUA also argue that certiorari should be denied because there is currently no conflict among the circuits, and because no conflict will arise since only the energy distributed under the NRA and not energy distributed under any other federal preference statutes will be affected by review in this case. MMWEC/CMEEC Br. p. 4; MEUA Br. p. 5, n.3. Neither contention is correct.

A conflict between circuits is not a prerequisite to certiorari review. Indeed, in the absence of such a conflict, this Court has in the past granted certiorari because of the "potential importance of a resolution on the merits" of an issue. *See, FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334-35 (1976).

It is completely disingenuous to suggest that the determination of what is a "public body" under the NRA will not impact the

4. Motion to Intervene on Behalf of NFTA, September 22, 1982.
5. Order Denying Motion to Intervene, October 4, 1982, p. 2.

determination of what is a "public body" under other federal power acts. Perhaps the issue can best be put to rest by noting that in this case MMWEC, CMEEC, and MEUA relied extensively on decisions involving other federal preference statutes to support their argument that the term "public bodies" should be restrictively interpreted.[6] Ironically, in its Brief in Opposition to the Cross Petition, MEUA relies on a case interpreting the Bonneville Project Act to support its reading of the term "public bodies" under the NRA. MEUA Br. in Opp., No. 86-942, p. 4.[7] The intervenors have urged that the authorities in respect of other federal power acts may be relevant in interpreting the NRA; applying the same test, this Court's review of the NRA language should have an effect on the determination of what is a "public body" under other federal power acts.

(4) **This is a case of first impression.** Concerned that the MTA is correct in noting that important cases of first impression can, and often do, warrant review, MMWEC and CMEEC now claim that this is *not* a case of "first impression." MMWEC/CMEEC Br. p. 4. They claim, instead, that this issue was considered by FERC in Opinion 151A and by the Second Circuit in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*"). This position is completely untenable because, as MMWEC and CMEEC know, and as has been pointed out

6. *See, e.g.*, Supplemental Brief of Intervenors in Support of FERC on the "Public Bodies" Issue, pp. 31-40, *MTA* v. *FERC*, 796 F.2d 584 (2d Cir. 1986); MEUA Brief Opposing Exceptions, June 9, 1983, pp. 30-39 (FERC Nos. EL80-19, EL80-24); Reply Brief of MEUA, November 17, 1982, pp. 22-23 (FERC Nos. EL80-19, EL80-24).

7. The citation by MEUA of *Aluminum Co.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) is helpful to the MTA for a second reason. As that case notes (*Id.* at 384), the definition of "public bodies" under the Bonneville Project Act included "states, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof." 16 U.S.C. § 832(b). Under that definition the MTA, as a state agency, would be a "public body." Moreover, the Court in *Aluminum Co.* drew the distinction between public utilities, which are to be given preference, and private utilities (investor-owned utilities) which are not to be given preference. *Id.* at 398-99. In this public/private dichotomy the MTA surely falls on the public, *i.e.* "preference", side.

before, the question of what is a "public body" under the NRA was expressly eliminated from consideration in Opinion 151A on due process grounds for failure to give adequate notice to the MTA. *MEUA* v. *PASNY* (Opinion 151A), 23 FERC ¶ 61,031 (1983). In addition, MMWEC, CMEEC, and MEUA were parties to a stipulation in PASNY which expressly eliminated the public body issue from consideration in that case.[8] There is no basis for any honest suggestion that this is not a case of first impression.

In order to further de-emphasize the novelty of this case and the astonishing about-face by FERC on the "public body" issue, MMWEC and CMEEC also say that the MTA has "mischaracterized" the Commission's earlier decision in *State of Vermont Public Service Board* v. *PASNY*, 55 F.P.C. 1109 (1976), and that the term "public bodies" was not interpreted "simply in accordance with its plain meaning" in that case. MMWEC/CMEEC Br. p. 4. The earlier decision speaks for itself and we believe our characterization is accurate, but it is worth pointing out that FERC itself admits that in reaching its decision in the case before this Court, it "overruled, in relevant part, its prior decision in [*Vermont*]". FERC Br. p.3, n.2.

MTA's Petition already discussed the question of whether the decision below is in error, and, of course, that issue will be addressed in greater detail if this petition is granted. However, in the Briefs in Opposition, there are two points which address the substance of the decision which require some immediate, albeit short, response.

MTA has argued that in interpreting the NRA, the Courts are required to consider the National Environmental Policy Act, the Urban Mass Transportation Assistance Act of 1970, and the Public Utilities Regulatory Policies Act of 1978. MTA Pet. pp. 20-24. MEUA's response that these later statutes cannot be considered to have "repealed by implication" any portion of the NRA (MEUA Br. pp. 6-7) completely misses the point. MTA

8. *See* Letter Agreement, October 24, 1983, "So Ordered" and filed October 28, 1983, *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984).

has not and does not urge "repeal by implication;" on the contrary, it urges that the NRA and the subsequent environmental acts referred to above be read together, and that the Congressional purpose behind each of the acts be harmonized. *See, e.g., Grindstone Butte Project* v. *Kleppe,* 638 F.2d 100 (9th Cir. 1981) (Avoiding conflict between two prior acts and NEPA, and holding that the Secretary of Interior is not only permitted but is required to consider environmental issues in carrying out regulatory functions under pre-NEPA acts); *Hyrup* v. *Kleppe,* 406 F. Supp. 214 (D. Colo. 1976), *aff'd,* Nos. 76-1452, 76-1767 (10th Cir. Nov. 7, 1977) (Recognizing and implementing the court's plain duty to read two acts to avoid a conflict between them, and expressly finding that the "public interest" requirement in an earlier statute included such restrictions as might be necessary for the protection of the environment as outlined in the later acts).

As their ultimate answer, the parties to this case have and continue to argue that the MTA is not in the correct forum and that it should petition Congress, not the Courts, to achieve its desired result. *See* MMWEC/CMEEC Br. p. 6; N.J. Br. pp. 3-4. We do not agree that we are not entitled to judicial relief from administrative and judicial error. In their most recent repetition of the "go to the Congress" suggestion, MMWEC/CMEEC rely on *FPC* v. *Texaco Inc.,* 417 U.S. 380 (1974), a case that is clearly distinguishable. In the *Texaco* case, Congress had attempted after the passage of the Natural Gas Act to exempt small producers from that Act, but that exempting legislation had been vetoed and Congress had failed to override the veto. Given that legislative history, this Court was understandably reluctant to "insert itself into the debate." 417 U.S. at 400-401. That is not at all the case here. There is no reason why this Court should not apply the principles underlying the NRA and subsequent legislation, along with the plain meaning of the NRA, to obtain a sensible reading of "public bodies."

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the petition for certiorari, the petitioner's request should be granted.

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